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Nos. 88-931 and 88-938

In the Supreme Court of the United States

OCTOBER TERM, 1989

LAWRENCE H. CRANDON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

THE BOEING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether payments made by petitioner Boeing Company to five employees – which were made solely because the employees planned to accept positions with the Department of Defense, and which were calculated to make up the difference between the recipients' salaries and benefits with the federal government and their higher salaries and benefits with Boeing – violated the prohibition in 18 U.S.C. 209(a) against the private supplementation of the salaries of federal officials.

2. Whether the United States is entitled to recover the amount of the illegal payments either from the recipients or from petitioner Boeing, to the extent recovery against Boeing is not time-barred.

PARTIES TO THE PROCEEDINGS

The United States was the plaintiff in the district court and the appellant in the court of appeals. The defendants in the district court and appellees in the court of appeals were petitioners Boeing Company, Lawrence H. Crandon, Thomas K. Jones, Harold Kitson, Jr., Melvyn R. Paisley, and Herbert A. Reynolds.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a)[1] is reported at 845 F.2d 476. The opinion of the district court (Pet. App. 16a-29a) is reported at 653 F. Supp. 1381.

JURISDICTION

The court of appeals' judgment was entered on May 5, 1988, and petitions for rehearing were denied on September 7, 1988 (Pet. App. 30a-31a). The certiorari petitions in No. 88-931 (Individ. Pet.) and No. 88-938 (Boeing Pet.) were filed on December 5 and 6, 1988, and were granted on April 3, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the appendix to the certiorari petition in No. 88-938.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 209(a) and 18 U.S.C. 1914 (1958) are reproduced at App., *infra*, 1a-2a.

STATEMENT

In 1981 and 1982, petitioner Boeing Company, a large defense contractor, paid a total of $485,000 to five of its employees, petitioners Melvyn Paisley, T.K. Jones, Herbert Reynolds, Harold Kitson, and Lawrence Crandon. The payments were made solely because the recipients planned to accept responsible positions in the Department of Defense, and they were calculated to make up the difference between the federal salary and benefits the recipient would earn while in government and the higher salary and benefits he would have earned if he had remained with Boeing, as well as to defray other expenses incurred in accepting the positions. The court of appeals held that the payments violated 18 U.S.C. 209(a), which bars private supplementation of the salaries paid by the United States for its employees' services, and that the United States is entitled to recover the amount of the payments in this civil action.

1. The record establishes that the payments at issue were made by Boeing to the five individual petitioners only because they had been selected for high-level positions in the Department of Defense, and in each case the payment was made immediately before or after the recipient began federal service.[2]

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[2] *Melvyn R. Paisley.* On or about May 1981, petitioner Paisley was offered and agreed to accept the position of Assistant Secretary of the Navy for Research, Engineering and Systems. Boeing Exh. [BX] 50 (C.A. App. 253); J.A. 239-240. In July 1981, Paisley was retained as a consultant in the Department of Defense. DX 58, 67; J.A. 238-239. On September 30, 1981, Paisley accepted a $183,000 payment from Boeing. BX 50 (C.A. App. 255). After Senate confirmation, Paisley took the oath of office on December 2, 1981. DX 59 (C.A. App. 101); J.A. 236, 239.

Lawrence Crandon. In 1981, petitioner Crandon agreed to Boeing's submission of his name to be a United States member of the NATO Air Command and Control Systems team. BX 50 (C.A. App. 291). On November 25, 1981, Crandon was notified that he had been selected, subject to security clearances and physical examinations. Crandon Exh. 4 (C.A. App. 115); J.A. 239. He ac-

The payments were designed to induce or facilitate the recipient's acceptance of the federal position. J.A. 288-289, 290-291, 304, 317-318, 329; see also GX 122, at 21-22 (C.A. App. 602); GX 121, at 108 (C.A. App. 724); J.A. 116.[3] During the preceding 20-year period, the only persons to whom Boeing of-

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cepted a $40,000 payment from Boeing on March 5, 1982, and commenced service three days later. BX 50 (C.A. App. 295, 299).

Thomas K. Jones. Petitioner Jones was urged by Defense Department officials in early 1981 to consider accepting the position of Deputy Under Secretary of Defense, and he notified them in March 1981 that he was willing to do so. BX 50 (C.A. App. 240). Jones accepted a payment of $132,000 from Boeing on May 15, 1981 (C.A. App. 243), and he was appointed on June 1, 1981, to the position of Deputy Under Secretary of Defense, Strategic & Space Systems. DX 19 (C.A. 99); J.A. 236, 237, 239.

Herbert K. Reynolds. In May 1981, petitioner Reynolds was asked by the Under Secretary of Defense to consider accepting the position of Deputy Director of Space and Intelligence Policy in the Office of the Under Secretary of Defense. On June 1, 1981, he notified Department officials that he was willing to do so. Reynolds accepted a payment of $80,000 from Boeing by check dated July 22, 1981. BX 50 (C.A. App. 267, 270). Four days later, on July 26, 1981, Reynolds was appointed as a consultant to the Department of Defense (DX 115 (C.A. App. 143); J.A. 236, 238), and he was formally appointed by the President in October 1981. BX 50 (C.A. App. 267).

Harold Kitson, Jr. In March 1982, petitioner Kitson was asked by the then-Assistant Secretary of the Navy, petitioner Paisley, if he was interested in the position of Deputy Assistant Secretary of the Navy for Command, Control, Communications and Intelligence. In April or May of that year, Kitson requested that his name be submitted. GX 127, at 19-22 (C.A. App. 898-899); J.A. 188. On July 6, 1982, Kitson was appointed as a consultant in the Department of the Navy, pending his formal appointment to office. DX 135 (C.A. App. 108); J.A. 238-239. On July 27, 1982, Kitson accepted a $50,000 payment from Boeing. BX 50 (C.A. App. 282). On September 1, 1982, he was appointed Deputy Assistant Secretary. DX 143 (J.A. Lodging No. 25).

[3] A document signed by the Executive Vice President of Boeing Aerospace Company stated that the payment to petitioner Jones was "conditional on" Jones' "acceptance of the job" (J.A. Lodging No. 14). An internal Boeing document expressed doubts that the Senate would give its consent to Paisley's appointment and suggested that a "memo of understanding" be executed to cover a situation in which Paisley would take the payment but then retire rather than go into government service (J.A. Lodging No. 16). Similarly, a Senior Vice President of Boeing recommended a payment to Paisley only "if Paisley ends up as a govt official or as consultant" (J.A. Lodging No. 15).

fered such payments were those – 16 in all – who left the Company to accept positions of responsibility with the United States Government, typically in the Department of Defense or the National Aeronautices and Space Administration (NASA).[4]

The circumstances of the payments also demonstrate that they were calculated to make up the difference between the recipient's federal salary and his higher Boeing salary and to defray other costs associated with accepting the government position. Each of the individual petitioners submitted to Boeing a written calculation of the projected reduction in his income over the expected period of his government employment. In monetary terms, the vast majority (and in some cases all) of the submissions consisted of (1) the difference between the salary and benefits he expected to realize for the duration of his federal position (identified in each case as the time remaining in the first Administration of President Reagan) and the higher salary and benefits he would have realized if he had stayed with Boeing, and (2) additional expenses he would incur in moving to and living in the Washington, D.C., area, such as moving expenses, house-hunting or rental costs, and higher state taxes and cost of living as compared with Seattle. Some of the petitioners also included in their submissions an estimate of the cash

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[4] The positions were: Office of Director of Defense Research & Engineering (1962); Director of Advance Systems Studies, NASA (1963); Scientific Advisor, DCS/Research & Development, U.S. Air Force (1966); Deputy Associate Administrator for Engineering, Office of Space, Sciences & Applications, NASA (1967); Assistant Director, Strategic Systems, Office of the Director of Defense Research & Engineering (1968); Staff Leader of Aeronautical Research, National Aeronautics & Space Council, Office of the President (1970); Technical Assistant, Strategic & Space System Department, Research & Engineering, Department of Defense (DoD) (1971); Director of Army Aviation Research Laboratories, Lewis Directorate, U.S. Army (1971); Technical Director, Naval Air Development Center (1972); Aeronautical & Space Science Committee, U.S. Senate (1973); Assistant Secretary of Commerce for Science & Technology (1973); Air Force Systems Command, DoD (1973); Assistant Secretary of the Air Force (1973); Staff Specialist, DoD SALT Task Force (1975); Deputy Director, Office of Director of Defense Research & Engineering (1975); Director, Cruise Missile Program, DoD (1978) (moved aborted). J.A. Lodging No. 20.

value of unused accrued leave, the accrued but unvested Company contributions to a corporate savings plan, and stock options that had been granted but were not yet exercisable. No other departing employee was entitled to the value of these benefits. J.A. 369-371. Moreover, in each case, the amounts requested for these accrued but unvested items represented a relatively small portion of the overall payment the individual sought. See generally J.A. Lodging Nos. 10 (Jones), 11 (Paisley),[5] 12 (Reynolds), 13 (Kitson); J.A. 526-529 (Crandon).

Boeing relied on similar considerations in its calculation of the severance payments. Charles P. Hagberg, Boeing's Assistant Director for Corporate Compensation, testified that the Company calculated the "severance" pay for each of the five individual petitioners as the sum of four factors: (1) the difference between his Boeing and federal salaries over the projected term of his federal employment, (2) the amount the Company would have contributed to two investment plans during the expected period of government employment if petitioners had remained at Boeing, (3) the cost of moving to Washington, D.C., and (4) the difference in the cost of living between Seattle and Washington. J.A. 366-375. See also J.A. 280-283 (June 17, 1982, description of Boeing policy for payments "to employees who would suffer substantial loss in salary and/or benefits by accepting Government employment and who are approved for participation by the Chief Executive Officer.").

The initial application of the four-factor test to each petitioner was made by the Industrial Relations Department in the Boeing Aerospace Company, the division of petitioner Boeing that employed each of them. See J.A. Lodging Nos. 5 (Paisley), 6 (Jones), 7 (Reynolds), 8 (Kitson), 9 (Crandon). Mr. Hagberg thereafter verified the calculations. J.A. 413-414. The President of Boeing Aerospace, Henry K. Hebeler, also reviewed the calculations. J.A. 326-327. Relying on the judgment of the

[5] Petitioner Paisley's calculation was based on the assumption that he would terminate his employment with Boeing. Ultimately, however, Paisley retired, and like retiring employees generally, he received the nonvested portion of the Company's contributions to the investment plan. J.A. 418-419.

Industrial Relations Department, Mr. Hebeler made written recommendations to petitioner Boeing's Senior Vice President, Clyde Skeen, and its Vice President for Industrial and Public Relations, Stanley M. Little, that the amounts be paid as proposed. J.A. 274-279, 284; J.A. Lodging Nos. 2, 15, 17, 18.[6]

Mr. Little, who knew how the payments were calculated (GX 121 (J.A. 310-313, 316-318; C.A. App. 689-690, 706, 728-729); J.A. 188), reviewed the recommendations of Mr. Hebeler and the Industrial Relations Department with T.A. Wilson, petitioner Boeing's chief executive officer. J.A. 308-309. Mr. Wilson knew that the calculations included the difference between each employee's Boeing salary and prospective government salary, as well as moving expenses. J.A. 288-290. Mr. Wilson was not acquainted with several of the individuals (J.A. 287-288)—or, therefore, with their past services to Boeing—and he had no information presented to him other than the Industrial Relations Department's calculations and recommendations. Mr. Wilson made no change in the amounts recommended for Jones, Reynolds, Kitson or Crandon. He did conclude that the proposed payment of $220,536 to Paisley was too high, and the Industrial Relations Department reduced the figure to the present value in 1981 of receiving $220,536 over four years, using a discount rate of 12%. The resulting figure of $180,064 was rounded to

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[6] Petitioners Kitson and Crandon received payments in 1982, after Boeing charged the payments to Paisley, Jones and Reynolds to the government as "overhead" expenses on Boeing's defense contracts and the Defense Contract Audit Agency questioned the legality of those charges. For Crandon and Kitson, the Industrial Relations Department calculated the proposed payment under both the four-factor approach and an alternative approach, which multiplied 5% of the individual's years of service with Boeing (1) by his current salary, and then (2) by a fraction consisting of the number of years the employee expected to remain in the government over four. See J.A. 282-283. The most significant factor in the alternative calculation was the number of years that the employee expected to remain in the government. The four-factor approach for Kitson yielded a figure of $59,310, and the alternative approach yielded a figure of $34,912. He was paid $50,000. The four-factor approach for Crandon yielded a figure of $52,260, and the alternative approach yielded a figure of $19,311. He was paid $40,000. J.A. Lodging Nos. 8, 9.

$180,000 and then approved. J.A. 382-385; J.A. Lodging No. 5.[7] Each individual petitioner also received a separate check for the amount of his *vested* benefits, to which any departing Boeing employee was entitled (Pet. App. 4a).

2. The United States brought this civil action, alleging that the payments violated 18 U.S.C. 209(a) and seeking disgorgement of the payments by the individual petitioners and damages from Boeing in an equivalent amount. The district court granted judgment in favor of petitioners (Pet. App. 16a-29a). The court first held that Section 209(a) does not prohibit any supplementation of a federal salary that is paid prior to the formal onset of the recipient's government employment (*id.* at 25a, 26a). The court further held that the payments were not unlawful under Section 209(a) because, as the court saw it, they were intended to "sever the relationship" between Boeing and its employees, not to supplement their government salaries or compensate them for their government service (*id.* at 20a, 26a). The court accepted the government's proof that the challenged payments were made by Boeing to induce the recipients to accept federal employment and to bridge the disparity between private and public salaries and benefits; that Boeing made such payments solely to persons leaving the Company for federal employment; and that the payments were intended by Boeing as the equivalent of the "paid leave" it granted to employees who work for a state or local government (*id.* at 17a-18a, 26a). But the court concluded that "the formula for calculation of severance pay cannot make the payment something other than severance pay" (*id.* at 26a).

The district court also ruled that the United States could not in any event recover damages in the amount of payments made in violation of Section 209(a) without showing actual corruption on the part of Boeing or the individual petitioners, which it had not proven (Pet. App. 28a). Finally, in the court's view, such

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[7] Subsequently, an additional $3000 was approved for petitioner Paisley, based on the difference between the Boeing salary he would have earned and the pay that he received as a government consultant while awaiting Senate confirmation. GX 111, Nos. 100165, 100429; J.A. 190, 194-195.

payments could not be recovered unless they were "secret," and it believed that the individual petitioners had made sufficient disclosure of the payments to certain employees of the Department of Defense (*id.* at 27a).[8]

3. The court of appeals reversed (Pet. App. 1a-15a). It first held, contrary to the district court's view, that payments made prior to the onset of federal service are within the reach of Section 209(a) (Pet. App. 6a-7a). The court noted that prior to 1962, the predecessor statute applied to "[w]hoever, being a Government official or employee," received a supplementation of salary (18 U.S.C. 1914 (1958)), but that Congress deleted the phrase "being a Government official or employee" when it enacted the present 18 U.S.C. 209 in 1962. The court also found this interpretation supported by the policies underlying Section 209 and the conflict-of-interest laws generally, which establish "rigid rules of conduct" to prevent activities that " 'arouse suspicions of malfeasance and corruption' " (Pet. App. 6a-7a). The court explained that "[l]arge severance payments by defense contractors to those going to work at high levels in the Defense Department certainly 'arouse suspicions,' and those suspicions are not reduced by making the payments just before government service begins" (*id.* at 7a).

The court of appeals rejected the view that Section 209(a) states an objective standard of conduct and requires no showing of intent, since Section 209(a) prohibits payments made "as compensation for" the recipient's federal services (Pet. App. 7a). However, the court found that the record established "com-

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[8] The district court held that the government's claims against Boeing based on four of the five payments were barred by the three-year statute of limitations in 28 U.S.C. 2415(b) for actions founded upon a tort (Pet. App. 29a). The claims against the individual petitioners are governed by the six-year statute of limitations in 28 U.S.C. 2415(a) for actions founded upon a contract, and therefore were not time-barred. The court of appeals affirmed these rulings by the district court, but held that the United States may not recover the full amount of the payment to Kitson, for which recovery from Boeing is not time-barred, from both Boeing and Kitson (Pet. App. 10a-12a). Petitioners do not challenge the court of appeals' holding that the United States' claims are not time-barred to this extent.

pensatory intent," and that the district court's contrary finding was clearly erroneous (*id.* at 8a). The court relied on four factors. First, the recipients and Boeing personnel officials "calculated salary, benefits and cost-of-living differences over the expected term of government employment," and the Chairman of Boeing, who approved the payments, "received a recommendation and was aware of the factors used to reach that figure" (*ibid.*). Second, "Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment" (*ibid.*). Third, Boeing's parallel policy of providing paid leave for its employees who work for a state or local government "suggests that payments to federal employees were designed to do the same thing without technically violating § 209" (*ibid.*). Fourth, the fact that only 21 such payments were made over the preceding 25 years, and only to persons entering high-level government positions, "suggests an intent to supplement the federal salaries of a limited number of employees" (*ibid.*).

The court of appeals rejected petitioners' contention that the government was not injured, and that the individual petitioners therefore were entitled to retain the payments, because they did not result in an actual conflict of interest. The court explained that this argument "ignores the preventive nature of the conflict of interest laws," under which "the appearance of conflicts rather than actual conflicts or corruption is all that is necessary" (Pet. App. 8a-9a). In this case, the court concluded, "[t]he appearance of large payments by a defense contractor to key Defense Department employees is enough; there is no need to show an actual conflict, much less actual corruption" (*id.* at 9a).

Finally, the court rejected petitioners' argument, based on common-law principles, that only "secret" profits give rise to a conflict of interest. The court reasoned that this suit is based on the statutory rule prescribed by Section 209, which is not limited to secret payments (Pet. App. 9a). Moreover, the court noted that even under the common law, effective disclosure must be "formal, complete, and directed to the proper parties" (*ibid.*). Here, because the individual petitioners' financial-reporting forms revealed only their total income from Boeing, without

separately identifying severance payments, the court concluded that any disclosures were "not sufficiently complete to insulate the payments from the conflict of interest laws" (*ibid.*).[9]

SUMMARY OF ARGUMENT

I.A. The prohibition in 18 U.S.C. 209 against private supplementation of federal salaries was first enacted in 1917 (see 18 U.S.C. 1914 (1958)) and was revised and reenacted as part of the comprehensive revision of the conflict-of-interest laws in 1962. It is "directed at the crime of bribery in its open or subtle form" (*Muschany* v. *United States*, 324 U.S. 49, 68 (1945)) and embodies the principle that "no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States" (33 Op. A.G. 273, 275 (1922)). Accordingly, Section 209 is framed as an absolute prohibition against double compensation.

B.1. Section 209(a) bars a person from receiving any privately paid salary or "supplementation of salary, as compensation for his services as an officer or employee of the executive branch * * *." The "severance" payments at issue in this case constituted "supplementations of salary" within the meaning of this provision. The principal component of each payment was an amount specifically designed to compensate the recipient for the difference between his federal salary and benefits during the anticipated period of his government service and the higher salary and benefits he would have received if he had remained with Boeing. Unquestionably a payment calculated on that basis is a "supplementation" of the federal salary for purposes of Section 209. The statute is not limited to supplementations in the nature of "salary," however. The provision has consistently been construed, both before 1962 and after, to bar payment of such items as travel and moving expenses and cost-of-living allowances for federal employees. Congress declined to disturb

[9] Judge Hall dissented from the panel's holding that the payments were made and received with "compensatory intent" (Pet. App. 13a-15a). Petitioners' petitions for rehearing with suggestion for rehearing en banc were denied by a 6-5 vote (*id.* at 30a-31a).

those administrative rulings when it enacted specific exceptions to several of them in 1958 and 1979, and Congress reenacted the basic prohibition in 1962 after it had been given a broad interpretation. Against this background, the other principal components of the payments here—moving expenses and a cost-of-living allowance—also constituted illegal salary supplementations for purposes of Section 209.

2. Contrary to petitioners' contention, the absolute prohibition against double compensation cannot be circumvented simply by arranging for a lump-sum payment to be made before the recipient begins work. The prohibition applies to "[w]hoever" receives "any" supplementation of salary for services rendered as a federal official; that all-encompassing language does not require that the recipient actually be in office at the time of payment or exclude certain supplementations based on their timing. The former Section 1914 applied to "[w]hoever, being a Government official or employee," but even with that limiting language it was understood by the Department of Justice and commentators to apply to severance payments made prior to the commencement of federal service. Significantly, moreover, that phrase was deleted from the statute in 1962, when Congress also deleted a virtually identical phrase in a related conflict-of-interest statute for the specific purpose of reaching payments made prior to the commencement of federal service. The policies of the prohibition likewise support this interpretation, because, as in the case of a bribe, an advance payment can be presumed to have a lingering effect on the recipient when he performs his official duties. Nor can an interpretation permitting private lump-sum payments for the recipient's federal services be justified by the need to attract qualified personnel to government, because Congress has enacted express exceptions when it concluded they were necessary.

3. The payments at issue here also constituted "compensation for" the recipients' federal services within the meaning of Section 209. The background and legislative history of that phrase show that it is intended to describe the requisite nexus between the payment and the services. In particular, Section 209 and its predecessor have been consistently construed to bar payments that were avowedly designed as supplementations of federal salary or that singled out federal employees for special

treatment. The undisputed evidence and factual findings by the district court establish that the payments at issue here had both of those characteristics, since Boeing offered "severance" payments only to persons entering federal service and based them on the financial losses the recipients would experience as a result. For these reasons, and because the payments were intended to induce the recipients to accept positions in a Department in which Boeing is substantially interested, the payments, by definition, constituted "compensation for" the recipients' federal service. This conclusion conforms to the consistent views of the Department of Justice, the Office of Government Ethics, and the leading commentators.

Section 209 does not require a showing of specific intent to supplement federal salaries as compensation for federal services; it is sufficient to show that the defendant knowingly made or received a payment having characteristics that rendered it unlawful under this settled construction of the statute. In any event, the district court's finding that petitioners did not act with "compensatory intent" was clearly erroneous.

II. The United States has a civil cause of action to require the recipients to disgorge the illegal payments or to recover damages from Boeing. Petitioners are not excused from liability in such an action on a waiver theory based on alleged disclosures of the payments to government officials on the recipients' financial-reporting forms. Section 209 does not authorize an administrative waiver, and the regulations governing the financial-disclosure program expressly provide that the filing of a report does not serve to exempt an employee from any substantive restrictions. There is no factual basis for petitioners' waiver argument in any event, because the recipients did not list their "severance payments" as such on their disclosure forms.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT BOEING'S PAYMENTS TO THE INDIVIDUAL EMPLOYEES VIOLATED 18 U.S.C. 209(a) AND THAT THE UNITED STATES IS ENTITLED TO RECOVER THE AMOUNT OF THE PAYMENTS

Section 209(a) of Title 18 establishes a broad prohibition against private supplementation of the salary a federal employee is paid for his services to the United States. The payments at

issue in this case were classic violations of that prohibition: they were made solely because the recipients planned to assume positions in the Department of Defense; they were calculated to make up the difference between the recipients' government salaries and their higher Boeing salaries, as well as to defray other expenses incurred in accepting government employment; and they were intended to encourage the recipients to accept that employment by mitigating the resulting financial sacrifices. The court of appeals' holding that such payments violate Section 209(a) is supported by the text and legislative history of the statute and the views of the commentators who were intimately involved in its enactment. That holding also is consistent with the advice given by the Department of Justice to other agencies and prospective appointees for many years. The court below therefore correctly held that the individual petitioners must disgorge the illegal payments and that, in the alternative, the United States may recover the amount of the payments from Boeing, to the extent recovery is not time-barred.

We do not contend that all "severance" payments made by a private employer to an individual entering federal service are prohibited by Section 209(a). The typical severance payment, which is made in consideration of past services to the employer and which does not take account of the anticipated future employment of the recipient, is not barred by Section 209(a)—especially if made pursuant to a pre-existing policy applicable to departing employees generally. Although such a payment may have the effect of "supplementing" the recipient's federal salary in the sense that it will be available during the period of his federal service, the payment is not made in consideration of—"as compensation for"—that federal service. But where, as here, the "severance" payment is made only because the recipient plans to accept a position with the federal government and the payment is calculated to compensate for the lower federal salary and other financial sacrifices associated with federal employment, Section 209(a) squarely applies. Such a payment is made, not as compensation for the recipient's past services to the private employer, but as compensation for his future services to the United States.

I. THE PAYMENTS AT ISSUE VIOLATED 18 U.S.C. 209(a)

A. Section 209(a) Broadly Prohibits Outside Compensation In Order To Assure The Independence and Undivided Loyalty Of Government Officials

The long history of the prohibition against private supplementation of salaries paid to federal employees for the performance of their official duties demonstrates a firm congressional purpose to assure the independence and undivided loyalty of government employees.

1. Section 209(a) was enacted in 1962 as part of the comprehensive revision of the conflict-of-interest laws made by Pub. L. No. 87-849, 76 Stat. 1119, 1125. It carries forward the basic prohibition against outside compensation contained in 18 U.S.C. 1914 (1958), which was enacted by Section 1 of the Act of March 3, 1917, ch. 163, 39 Stat. 1106.

The 1917 provision was enacted in response to the practice of substantial payments by private foundations to supplement the federal salaries of individuals employed by the Bureau of Education at the rate of $1 per year. Congress was concerned that the recipients might be induced to adhere to the views of the foundations who furnished their financial support, and that the government would, as a result, be deprived of their independent judgment in matters affecting the Nation's youth.[10] Congress further concluded that the threat to the independence of government officials exemplified by the practice in the Bureau of Education was a government-wide concern, and it accordingly gave the 1917 Act a government-wide sweep. Nor was the 1917 Act limited to payments by persons who had business before the agency in which the recipient was employed. These broad features of the basic prohibition were carried forward in the

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[10] See 54 Cong. Rec. 2039-2047, 4004-4006, 4010-4013, 4017, 4057-4059, 4859, 4920-4922, 4925 (1917); Memorandum for the Attorney General from Frederick W. Ford, Acting Ass't A.G., Off. Legal Counsel (OLC), Re: "Conflict of Interest Statutes," at 118-120 (Dec. 10, 1956) [1956 A.G. Mem.], *reprinted in Federal Conflict of Interest Legislation: Hearings on H.R. 1900, H.R. 2156, H.R. 2157, H.R. 7556 and H.R. 10575 Before the Antitrust Subcomm. (Subcomm. No 5) of the House Comm. on the Judiciary*, 86th Cong., 2d Sess. 619, 738-740 (1960) [*1960 Hearings*]; Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 54-55 (1960) [*N.Y. Bar Report*]; B. Manning, *Federal Conflict of Interest Law* 148-149 (1964).

present Section 209(a), which applies to the receipt and payment of "any" salary and "any" supplementation of or contribution to salary, "[w]hoever" may be the payor.[11]

Soon after the 1917 Act was passed, the Attorney General explained that the prohibition embodies the principle that "no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States." 33 Op. A.G. 273, 275 (1922). This Court similarly observed that Section 1914 was "directed at the crime of bribery in its open or subtle form." *Muschany* v. *United States*, 324 U.S. at 68. The background of the 1962 revision of the conflict-of-interest laws demonstrates that these same purposes animated Congress's decision to retain the prohibition against outside compensation in the present 18 U.S.C. 209(a), albeit with certain modifications discussed below.

2. Congress enacted the present 18 U.S.C. 209(a) and related conflict-of-interest laws in 1962 based upon in-depth studies of the then-existing laws by the House Judiciary Committee, the Association of the Bar of the City of New York, the Executive Branch, and various commentators.[12] In 1957, Chairman Celler instructed the House Judiciary Committee staff "to prepare a detailed study and analysis of existing Federal conflict-of-interest laws to the end that they might be revised,

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[11] See Manning, at 156-157 ("It must be emphasized that the statute forbids outside compensation even if the payor has no dealings or relations whatever with the government and no special interest in its policies. It is not limited in its application to compensation paid by a source in a sensitive relationship with the government employee's agency—a supply contractor dealing with the agency, for example."); Accord, Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1137 (1963).

[12] Congress extensively relied on the congressional staff and Bar Association studies and the views of leading commentators when it revised the conflict-of-interest laws in 1962, and those materials therefore are a reliable source of guidance in construing Section 209. Because petitioners contend that this case involves a novel application of the statutory prohibition that they could not have anticipated, the statutory background and publications of authoritative commentators have special relevance here. This Court has examined studies and commentary submitted to Congress over a period of years to inform its interpretation of Congress's enactments. See, *e.g.*, *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 409-412 (1985); *Lowe* v. *SEC*, 472 U.S. 181, 190-202 (1985); *EEOC* v. *Wyoming*, 460 U.S. 226, 229-233 (1983); *ICC* v. *New York, N.H. & H. R.R.*, 372 U.S. 744, 753-758 (1963).

simplified, and coordinated" (H.R. Rep. No. 748, 87th Cong., 1st Sess. 7 (1961) [House Report]). The resulting report recommended that Congress retain the prohibition against supplementation of federal salaries, with certain revisions. Staff of Subcomm. No. 5 of the House Comm. on the Judiciary, 85th Cong., 2d Sess., *Federal Conflict of Interest Legislation* 44-46, 61-63 (Comm. Print 1958) [*Staff Report*]. Based on a review of the background of 18 U.S.C. 1914 (1958) and the precedents construing it, the *Staff Report* explained (at 44) that the prohibition rests on the premise that when a government employee receives outside compensation for his government work, "his impartiality may become impaired, not only in direct transactions with that employer on behalf of the Government, but also with respect to general policies espoused by the private employer." For this reason, the report stressed, the provision "is framed as an absolute prohibition against double compensation" (*ibid.*, citing McElwain & Vorenberg, *The Federal Conflict of Interest Statutes*, 65 Harv. L. Rev. 955, 966-967 (1952)). Echoing that view, the Judiciary Committee's Report on the bill enacted in 1962 explained that the provision "seeks to avoid divided loyalty of Government officials by prohibiting private compensation of Government services" (House Report 6).

Congress's revision of the governing laws in 1962 also was based on its consideration of what the House Report described as "[a] penetrating 2-year study of the operation of the Federal conflict-of-interest statutes undertaken by a special committee on conflict of interest laws of the Association of the Bar of the City of New York." House Report 8; see also S. Rep. No. 2213, 87th Cong., 2d Sess. 4 (1962) [Senate Report]. The Bar Association's report elaborated upon the purposes of the prohibition against outside compensation (*N.Y. Bar Report* 211-212):

> The rule is really a special case of the general injunction against serving two masters. Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement

has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers. The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government. In part the fear is that the government employee will not keep his nose to the grindstone; in part the fear is close to the fear of bribery; in part the fear is that outside forces will subvert the operation of regular policy-making procedures in the government (the historical source of Section 1914); and in part the rule is grounded in considerations of personnel administration.

In light of these broad prophylactic purposes, the Bar Association likewise described the prohibition in absolute terms: "In the strictest sense, Section 1914 is a conflict of interest statute. The employee does not have to *do* anything improper in his office to violate the statute. His receipt of the outside salary for his government work, coupled with his status as a government employee, is all that is required" (*N.Y. Bar Report* 55).

The responsible congressional committees conducted extensive hearings in 1960, 1961 and 1962 on bills that incorporated the recommendations of the Judiciary Committee staff and the New York City Bar Association. See *1960 Hearings*; *Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412 and H.R. 7139 Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961) [*1961 Hearings*]; *Conflicts of Interest: Hearing on H.R. 8140 Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962) [*1962 Hearing*].[11] The 1962 revision of the conflict-of-interest laws,

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[11] President Kennedy appointed a special committee to study the conflict-of-interest laws in the spring of 1961, and he sent a message to Congress on the subject on April 27, 1961. H.R. Doc. No. 145, 87th Cong., 1st Sess. (1981). The President also transmitted a proposed bill to implement that message, which was introduced as H.R. 7139, 87th Cong., 1st Sess. (1961). House Report 8; *1961 Hearings* 21-25, 30-32, 57-63. Congress also had before it an extensive study of the conflict of interest laws (including 18 U.S.C. 1914 (1958)) undertaken by OLC in 1956 (see 1956 A.G. Mem., note 10, *supra*), as

including 18 U.S.C. 209, largely incorporated those recommendations, taking into account as well the views of the Executive Branch and commentators (see note 13, *supra*).[14]

Thus, in enacting 18 U.S.C. 209, Congress reaffirmed the fundamental importance of what the court of appeals termed the "rigid rules" against private supplementation of the salaries paid to government officials for their services to the United States. Those rules serve to preserve both the actual independence and undivided loyalty of government officials and the public's faith in those virtues, which are essential to " 'the very fabric of a democratic society' " (Pet. App. 6a-7a, quoting *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).[15] These concerns are directly implicated in this case, because, as the court of appeals observed, "[l]arge severance payments by defense contractors to those going to

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well as studies of Section 1914 and other conflict-of-interest laws by a number of commentators. See *Staff Report* 44 nn. 254 & 256, citing McElwain & Vorenberg, 65 Harv. L. Rev. at 966-967, and Dembling & Forrest, *Government Service and Private Compensation*, 20 Geo. Wash. L. Rev. 174, 193 (1952); 1956 A.G. Mem. (*1960 Hearings* 747-749), quoting Davis, *The Federal Conflict of Interest Laws*, 54 Colum. L. Rev. 893, 905-907 (1954).

[14] On May 19, 1958, "based upon the[] recommendations" in the *Staff Report*, Representative Celler introduced H.R. 12547, 85th Cong., 2d Sess. That bill was reintroduced in the next Congress as H.R. 2156, 86th Cong. 1st Sess. (1959), and the Subcommittee's *1960 Hearings* focused in large part on the latter bill. The recommendations of the New York City Bar Association were embodied in H.R. 10575, 86th Cong., 2d Sess. (1960), which was introduced by Representative Lindsay. The Subcommittee received extensive testimony from Roswell Perkins, the Chairman of the Bar Association's special committee. House Report 7-8; *1960 Hearings* 383-483; *1961 Hearings* 100-132; see also *1962 Hearing* 42-52. H.R. 10575 was reintroduced in 1961 as H.R. 3050, 87th Cong., 1st Sess. In that same year, Representative Celler introduced H.R. 3411, 87th Cong., 1st Sess., which was based on both the *Staff Report* and the Bar Association's proposals. The bill enacted into law in 1962 (H.R. 8140, 87th Cong., 2d Sess.) was a composite that included provisions of both those proposals. *1962 Hearing* 36 (remarks of Rep. Lindsay).

[15] Compare *Buckley* v. *Valeo*, 424 U.S. 1, 27 (1976):

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).

work at high levels in the Defense Department certainly 'arouse suspicions' " (Pet. App. 7a) – just as private supplementation of salaries in the Bureau of Education aroused suspicion in 1917 and led to enactment of the prohibition now contained in Section 209(a). As we now show, the text and legislative history of Section 209 demonstrate that petitioners violated that statute.

B. Boeing's Payments Supplemented The Individual Petitioners' Federal Salaries And Constituted Compensation For Their Federal Services

1. *The Payments Were "Supplementations Of Salary" Within The Meaning Of Section 209(a)*

Section 209(a) bars the receipt of "any salary, or any contribution to or supplementation of salary, as compensation for [the recipient's] services as an officer or employee of the executive branch * * * from any source other than the Government of the United States * * *."[16] The payments at issue in this case violated the explicit terms of this provision.

a. The principal purpose and effect of the severance payments in this case was to make up some or all of the difference between the recipient's federal salary and benefits and the higher salary and benefits he would have earned if he had remained with Boeing. This much is evident from the fact that a salary and benefit differential was the principal component of the calculations prepared by both the individual petitioners and Boeing. See pages 4-7, *supra*. There can be no doubt that a payment resting on that rationale constitutes a "supplementation" of the recipient's federal salary for purposes of 18 U.S.C. 209(a). The New York City Bar Association, for example, stated in its 1960 report with respect to the prior Section 1914: "Clearly the appointee's former employer cannot under this section make up the difference between his former salary and his government salary." *N.Y. Bar Report* 65. There is no indication that Congress departed from that central principle when it enacted Section 209 in 1962. To the contrary, Roswell Perkins, Chairman of the Bar Association's special committee and the leading con-

[16] Section 209(a) exempts amounts "contributed out of the treasury of any State, county, or municipality." This exception was included to preserve agricultural extension and similar programs. Manning, at 172.

temporary commentator on the conflict-of-interest laws,[17] explained immediately thereafter that "[t]he most important application of the outside compensation prohibition is the typical case where a corporate executive is asked to go to Washington, and his corporation offers to pay all or part of the difference between his present salary and his future government salary." Perkins, 76 Harv. L. Rev. at 1137-1138; Petrowitz, *Conflict of Interest in Federal Procurement,* 29 Law & Contemp. Probs. 196, 209 n.48 (1964) (same).

b. The other components of the payments at issue here also are "supplementation[s] of salary" within the meaning of Section 209(a). The quoted phrase has not been construed to limit the prohibition to payments in the nature of "salary," narrowly defined—*i.e.,* a "fixed annual or periodical payment for services" (*Benedict* v. *United States,* 176 U.S. 357, 360 (1900)). It has been applied to virtually all transfers of economic value that are made because of the recipient's federal service. This construction was firmly established prior to the enactment of Section 209(a) and was carried forward in that provision.

The language of 18 U.S.C. 1914 (1958) was somewhat unclear with respect to the type of payments that a federal employee could not receive. This ambiguity resulted from the fact that although the second paragraph of Section 1914, which stated the *payor's* offense, applied to any person who "makes any contribution to, or in any way supplements the salary of," a government official, the first paragraph, which stated the *payee's* offense, applied to any government official who "receives any salary in connection with his services." Because the first paragraph applied only to the receipt of "salary," it might have been argued that a federal employee would not violate the law if he received items of monetary value that were not in the form of "salary" in the narrow sense. See Davis, 54 Colum. L. Rev. at 904 n.56. Nonetheless, in 1956, the Comptroller General had

[17] Roswell Perkins was regarded by Members of Congress as a leading expert on the conflict-of-interest laws. Senator Keating stated that "[t]here is probably no one better informed person on this subject" (*1962 Hearing* 37), and Representative Lindsay described him as the "author of 80 percent of the House bill" and stated that his committee's report was "probably the leading work on the subject of conflicts of interest in the Federal branch that has been written to date" (*id.* at 35).

construed the first paragraph of Section 1914 to bar a federal employee from accepting tuition, travel, and living expenses for a training program he attended in his official capacity. 36 Comp. Gen. 156 (1956). The Comptroller General also had construed the second paragraph of Section 1914 to bar a broad range of payments to a federal employee, such as travel and living expenses and special allowances to compensate for the higher cost of living in his place of employment.[18] See *N.Y. Bar Report* 64 ("salary" in Section 1914 "has been, and probably will be, construed to include almost any kind of a transfer of value to the employee that smacks of compensation").

In response to the Comptroller General's opinions construing Section 209(a) to bar outside payment of expenses incident to a federal employee's participation in a training program, Congress enacted an exception in the Government Employees Training Act of 1958 permitting such expenses to be paid by private parties, but only in carefully limited circumstances—namely, where the payor is a non-profit organization exempt from taxation under 26 U.S.C. 501(c)(3). See § 19, 72 Stat. 336; H.R. Rep. No. 1951, 85th Cong., 2d Sess. 6, 12-13 (1958). Congress did not disturb the general prohibition in 18 U.S.C. 1914 (1958), as construed by the Comptroller General, against the private payment of such expenses in all other circumstances. Compare *Public Employees Retirement System* v. *Betts,* 109 S. Ct. 2854, 2861 (1989). An identical exception was included in Section 209 itself when Congress revised the conflict-of-interest laws in 1962, thereby reaffirming that any payment of expenses incurred by a federal employee incident to his employment is barred, even if it does not take the form of a periodic "salary." 18 U.S.C. 209(d); 5 U.S.C. 4111(a).

Moreover, when Congress enacted Section 209(a) in 1962, it revised the language of both paragraphs of the former Section 1914 in order expressly to prohibit the receipt as well as the pay-

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[18] See 2 Comp. Gen. 775 (1923) ("salary and expenses"); 18 Comp. Gen. 460 (1938) (travel expenses incident to employee's detail to foreign country); 26 Comp. Gen. 15 (1946) (cost-of-living allowance); 35 Comp. Gen. 639 (1956) (cost-of-living allowance); see generally Manning, at 161.

ment not only of "salary," but also any "supplementation of" or "contribution to" salary. This change was based on a recommendation in the *Staff Report* (at 62), which explained that it would make "clear that the receipt of lump-sum payments, which supplement salary although they may not themselves constitute salary, are also forbidden." *Id.* at 61; see also House Report 13, 24; *1960 Hearings* 182, 207. Thus, Section 209(a) carried forward the broad scope of the prior Section 1914 with respect to the types of cash payments and other transfers of value that are barred. Manning, at 162-163;[19] Perkins, 76 Harv. L. Rev. at 1138-1139, 1141 & n.93. Compare *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379-382 (1982); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

c. The foregoing interpretation is confirmed by subsequent events with respect to one of the components of the severance payments at issue in this case—moving expenses. In 1979, Congress amended Section 209 to permit a private employer to pay relocation expenses in only one narrow situation: where the recipient is a participant in a special interchange or fellowship program established by statute or Executive Order that offers appointments for a period of not to exceed one year. See 18 U.S.C. 209(e), as amended by Pub. L. No. 96-174, 93 Stat. 1288. The legislative history shows that this amendment was enacted in response to an opinion of the Office of Legal Counsel that payment of an individual's moving expenses because he is entering federal service violates Section 209(a). H.R. Rep. No. 674, 96th Cong., 1st Sess. 2, 5, 6, 8 (1979); see 2 Op. O.L.C. 267 (1978) (App., *infra*, 3a-8a).[20] In carving out the special exception in 18 U.S.C. 209(e), Congress left undisturbed the general prohibition in Section 209(a), as construed by OLC, against reimbursement of the moving expenses of a person

[19] Professor Manning, of the Yale Law School, was the Staff Director of the New York City Bar Association's study of the conflict-of-interest laws (*N.Y. Bar Report* viii) and served on the special committee appointed by President Kennedy in 1961 to study those laws (H.R. Doc. No. 145, at 2).

[20] Section 1914 was understood to prohibit payment of moving expenses as well. See *1961 Hearings* 63.

entering government service. See 5 Op. O.L.C. 150, 150-151 (1981) (App., *infra,* 9a-11a) (payment of moving expenses violates Section 209(a) if made because of recipient's federal service, rather than past service to payor). Compare *Betts,* 109 S. Ct. at 2861. It therefore is especially clear that the portion of each payment here that is attributable to the recipient's expenses in moving to Washington, D.C., violated Section 209(a).

Furthermore, the legislative history of the 1979 amendment makes clear that, even in the special context of a short-term Presidential interchange program, the exception permitting payment of relocation expenses does not overcome the general prohibition Congress perceived in Section 209(a) against private payment of a federal employee's "personal living expenses" (H.R. Rep. No. 674, at 2-3). This legislative history confirms that the payments here also violated Section 209(a) to the extent they were designed to reimburse the recipients for a portion of their personal living expenses—specifically, the portion that compensated for the higher cost of living in Washington, D.C. In sum, all of the principal components of the severance payments at issue in this case were illegal "supplementations" of the recipients' federal salaries.[21]

2. *Section 209(a) Does Not Exempt Supplementations Of Salary Made Prior To The Commencement Of Federal Service*

In light of the text and legislative history of Section 209(a), petitioners do not seriously dispute that the various types of payments just discussed are prohibited as a general matter.

[21] The calculation of the proposed severance payment by both Boeing and the recipients also took into account the value of unvested portions of past contributions by Boeing to the individual petitioners' accounts under the Company's Voluntary Investment Plan. The unvested portion ordinarily is forfeited when an employee leaves the Company. See pages 4-5, *supra.* Accordingly, the inclusion in the severance payments of an amount attributable to that unvested portion was indistinguishable for present purposes from any other transfer of economic value made solely to reduce the financial hardship of accepting a federal position, rather than to compensate for past services to the payor. It therefore constituted a "supplementation" of the recipient's federal salary within the meaning of Section 209(a).

The individual petitioners do argue (Br. 18-32), however, that Section 209(a) can be avoided simply by combining those payments, characterizing the total as a "severance payment," and arranging for it to be made before the recipient begins his federal employment. See also Boeing Br. 19 n.9. The text, legislative history, and purposes of Section 209(a) foreclose this effort to circumvent the absolute statutory bar against the private supplementation of federal salaries.

a. Section 209(a) provides:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government * * * from any source other than the Government of the United States * * *; or
>
> Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

This statutory language is written in all-embracing terms. The first paragraph broadly applies to "[w]hoever" receives such payments; it is not limited to persons who happen to be federal officials at the time the payments are made. Accordingly, payments received by an individual before or after his federal service are within the statutory ban. Moreover, the first paragraph applies to the receipt of "any" supplementation of salary from "any" source other than the United States. The term "any" underscores the comprehensive thrust of the prohibition (*United States* v. *Monsanto*, 109 S. Ct. 2657, 2663 (1989)), for "Congress could not have chosen broader words to define [its] scope" (*id.* at 2662). See also *Betts*, 109 S. Ct. at 2864. The language of the first paragraph of Section 209(a) therefore clearly covers lump-sum payments (including those characterized as "severance payments"), as long as they are "compensation for" the employee's federal service. See pages 34-45, *infra*.

The individual petitioners argue, however, that the second paragraph of Section 209(a) does not bar payment of a salary supplementation prior to the time the recipient assumes his federal position. Petitioners rest this argument on the premise that the second paragraph is limited to payments made "to . . . any such officer or employee." See Br. 19, 20, 23. This assertion is refuted by the operative language of the second paragraph taken as a whole, which petitioners "regrettably submerge[] in ellipsis" (*Bowen* v. *Georgetown Univ. Hosp.*, 109 S. Ct. 468, 476 (1988) (Scalia, J., concurring)). The second paragraph of Section 209(a) imposes liability on any person who "pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee." The use of the disjunctive "or" in two places, and the location of the commas, demonstrates that the quoted language states three separate prohibitions. The third prohibition, which applies here, imposes liability on a person who "in any way supplements the salary of" "any such officer or employee." This language is not limited to supplementations paid "to" the recipient at the time he is an officer or employee; all the statutory text requires is that the payment "supplement[] the salary of" a federal officer or employee—a consequence that can result from a payment made prior to the formal onset of federal service as well as after. It also is significant that the relevant language broadly refers to all payments that "in any way" supplement the salary of a federal employee, thereby manifesting a congressional purpose to preclude the sort of circumvention that would be encouraged by petitioners' proposed loophole for all pre-appointment payments.

b. The background and legislative history of the 1962 Act confirm this straightforward reading of the statute in several ways. First, as we have explained (see pages 21, 22, *supra*), Congress revised the first paragraph of the prohibition to make clear that it (like the second paragraph) would apply to "lump sum" payments that supplement the recipient's federal salary (*Staff Report* 61)—the most obvious of which would be lump-sum severance payments made in consideration of the recipient's federal service. Second, one of Congress's purposes in thus revising the first paragraph was to "conform" the prohibitions

applicable to the payor and payee. House Report 24; *Staff Report* 45, 61. This purpose strongly suggests that the second paragraph bars the making of all payments the receipt of which is barred by the first paragraph; since the first paragraph clearly applies to payments made prior to formal commencement of federal service, the second paragraph therefore does as well.

Third, and of particular significance here, the first paragraph of the prohibition against outside compensation, as set forth in 18 U.S.C. 1914 (1958), provided: "Whoever, *being a Government official or employee*, receives any salary in connection with his services as such an official or employee" (emphasis added). The individual petitioners argue (Br. 20-21) that the emphasized language limited the application of Section 1914 to payments made to incumbent federal officials. Even if that proposition is correct, however, petitioners' effort to use it to exempt the "severance" payments at issue here from the coverage of Section 209(a) is doomed by the fact that Congress *deleted* that phrase when it revised the prohibition in 1962.

Petitioners argue (Br. 20-22) that the Court should not give effect to Congress's deletion of the phrase on which they rely because the legislative history does not expressly refer to payments made prior to the commencement of federal service and does not state that the coverage of the prohibition was changed in this respect. As this Court recently held, however, there is no requirement that Congress recite in legislative history its intention to depart from what may have been the previous rule in order for the courts to give effect to its new enactment. *United States* v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026 (1989); see also *Monsanto*, 109 S. Ct. at 2662-2663; *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983).

Indeed, the premise of petitioners' argument—that former Section 1914 would not have barred the payments here—is of dubious validity. Roswell Perkins observed that prior to enactment of Section 209(a), "[t]he Justice Department's attitude toward severance payments ha[d] been stern." 76 Harv. L. Rev. at 1138-1139. He relied on a Justice Department memorandum stating with respect to Section 1914 that " 'a special severance

payment of more than nominal amount made to an employee *in anticipation of his working for the Government, and whether paid at once or spread,* would in all likelihood be objectionable.' "[22] Several commentators cited in the legislative history of the 1962 Act also understood Section 1914 to bar severance payments made in consideration of the recipient's anticipated services to the federal government.[23] See also *1962 Hearing* 40 (statement of Rep. Lindsay).

Moreover, the report on the bill proposed by the New York City Bar Association recognized that "occasionally an outside source may try to make a payment to a government employee before he becomes an employee or after he terminates his government employment, with the intention and purpose of compensating the employee for the work done while in Washington." *N.Y. Bar Report* 213. The report then stated that although Section 1914 was ambiguous on this point (*id.* at 64-65, 212-213), the Association's bill explicitly barred such payments "[w]henever received" (*id.* at 213). See *id.* at 286-287 (§ 5(b) of Association's proposed bill); *1961 Hearings* 47 (Justice Department comments on § 5(b)).

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[22] See DOJ Mem., *Conflicts of Interest Questions Arising From Stock Options, Pension Rights and Other Executive Benefits of Individuals Entering Government Employment From Private Business,* at 5 (emphasis added), *quoted in* Perkins, 76 Harv. L. Rev. at 1139 n.89; see also *id.* at 1141 n.93 (" 'an *ad hominem* grant of [a stock] option upon the employee's leaving his company to enter the Government might contravene the statute' ").

[23] See McElwain & Vorenberg, 65 Harv. L. Rev. at 967 ("It is perfectly plain that Section 1914 outlaws double compensation for Government service, but it is sometimes difficult to determine when a particular payment is 'in connection with his services' as a Government employee. For example, it is sometimes hard to tell whether a bonus paid just before an entry into Government service constitutes in fact a payment for past services rendered the employer or whether it is a prospective sweetening of the employee's Government salary."); Davis, 54 Colum. L. Rev. at 905 (footnote omitted) ("[T]he retirement bonus given to a departing company official is permissible when it is said to be paid in gratitude for past services rendered or as an inducement to return after the termination of the Government job, but the same bonus is not acceptable when its purpose is to enable the company official to carry on financially in a low-paying Government position.").

Against this background, whatever uncertainty there may have been regarding the validity of pre-employment payments under the former Section 1914, Congress's omission of the phrase "being a Government official or employee" from the first paragraph of Section 209(a) removed any limitation on its reach in this regard.[24] This conclusion is reinforced by Congress's deletion of a similar phrase ("being * * * [an] officer or employee of the United States") from the related prohibition in 18 U.S.C. 281 (1958) when it revised and reenacted that provision as 18 U.S.C. 203 in 1962. Section 281, like the present Section 203, barred a person from receiving compensation for services rendered on behalf of a private party before a government agency while the recipient was a government employee. The House Report explained the deletion of the phrase just quoted by observing that although "Section 281 fails to prohibit preemployment receipt or agreement to receive, or postemployment receipt of, compensation with respect to services to be rendered or actually rendered during the period of Government employment," the new Section 203 "would correct this omission." House Report 20; see also *Staff Report* 8, 22, 25, 49, 51.

The legislative history thus shows that Congress was aware, and specifically intended, that deletion of the phrase "being * * * [an] officer or employee of the United States" from the prohibition in 18 U.S.C. 281 (1958) would have the effect of prohibiting receipt of "all compensation" for services rendered on behalf of *private parties* while in office, "irrespective of the time of its payment." House Report 9. Congress therefore must also have been aware that its deletion of the parallel phrase "being a Government official or employee" in 18 U.S.C. 1914

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[24] Petitioners contend that the Kennedy Administration could not have intended to criminalize pre-employment severance payments because the Secretary of Defense in that Administration, Robert S. McNamara, received payments totalling $618,750 from his former employer. See Br. 22 n.14, citing *McNamara To Get $618,750 As Bonus*, N.Y. Times, Jan. 22, 1961, at 49, col. 6. However, as the newspaper article explains, those payments were made pursuant to an established company policy and were compensation for his past services. See also *Nomination of Robert S. McNamara: Hearing Before the Senate Comm. on Armed Services*, 87th Cong., 1st Sess. 33-35 (1961).

(1958) would remove any doubt that the new Section 209(a) prohibits the receipt of all compensation for services to be rendered on behalf of the *United States* while in office, irrespective of the time of payment. Sections 281 and 1914 were viewed as interrelated, and they overlapped in coverage where the services for which the private party paid compensation could be said to have been performed for both the government and the private party. *Staff Report* 24, 61. See, *e.g.*, 40 Op. A.G. 168 (1942); 31 Op. A.G. 470 (1919); 2 Comp. Gen. 775 (1923); see also 41 Op. A.G. 217, 220 (1955); 40 Op. A.G. 187, 190 (1942).[25]

It also is significant that the prohibition against receipt of outside compensation for government services has consistently been regarded as closely related to the prohibition against bribery (House Report 6, quoting *Muschany*, 324 U.S. at 68) and "buttresses the bribery sections * * * by eliminating donations to salary, even where it is impossible to prove intent that official action should be influenced by the payment." *Staff Report* 45; see also *id.* at 61; *N.Y. Bar Report* 211. As petitioners concede (Individ. Br. 23), the bribery statute, 18 U.S.C. 201, expressly applies to payments made prior to the formal commencement of federal service, because it covers payments made (with intent to influence official action) to a "person who has been selected to be a public official."[26]

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[25] Petitioners also rely (Individ. Br. 20) on a passage in the Senate Report stating (at 14) that Section 209 forbids payments "to a Government employee," without expressly referring to a person who has not yet formally commenced his federal service. The Senate Report described the statutory ban in general terms; it did not purport to explain all the details of its application. The Senate Report similarly explained (at 9) the new 18 U.S.C. 203 in general terms as prohibiting "officers or employees of the Government from receiving compensation for services rendered for others," without expressly referring to payments received before the formal commencement of federal service; yet it is clear that Section 203 reaches such payments.

[26] Petitioners point out (Individ. Br. 23) that the bribery section specifically mentions payments made to persons who have not yet assumed office while Section 209 does not. However, Section 209 broadly applies to "[w]hoever" receives "any" supplementation of salary for his government services; this all-encompassing language clearly includes recipients who have not yet formally assumed office. Compare *Monsanto*, 109 S. Ct. at 2663. The fact that Section

c. Accordingly, the text and legislative history of Section 209(a) establish that "[t]he time of receipt of the outside compensation is clearly irrelevant under the [1962] act, if the compensation is for government services." Perkins, 76 Harv. L. Rev. at 1137. Petitioners suggest (Individ. Br. 18) that the Department of Justice only recently came to that view, because this is the first time it has brought a civil or criminal case against anyone for receiving a severance payment. However, for more than 15 years, the Office of Legal Counsel has consistently taken the position in its advice to other agencies and prospective appointees that Section 209(a) bars "severance" payments made in consideration of the recipient's entering federal service, rather than for past services to the payor, and calculated to compensate the recipient for his lower federal salary and benefits and other expenses incident to his acceptance of the appointment. See App., *infra,* 3a-50a.[27] The Office of Government Ethics,

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209 does not specifically identify that (or any other) subcategory of recipients " 'does not demonstrate ambiguity' in the statute: 'It demonstrates breadth.' " *Ibid.*, quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985). The difference in the wording of Sections 201 and 209 is attributable to the fact that the bribery provisions were the subject of a somewhat distinct study and revision (see *Staff Report* (Pt. II)), and Congress therefore did not use the same terminology in revising Section 201 as it used in revising the conflict-of-interest laws. Accordingly, the appropriate place to look for parallels to the precise text of Section 209 is the related conflict-of-interest provision in 18 U.S.C. 203, which unquestionably covers pre-employment payments even though its text does not specifically refer to them.

Petitioners also argue (Individ. Br. 23-24) that they were beyond the reach of the bribery statute at the time they accepted the severance payments because they had not been officially informed that they would be nominated or appointed (see 18 U.S.C. 201(a), para. 2), and that it therefore would be anomalous to apply Section 209 to them. This argument is without merit. Each of the individual petitioners had already either started federal employment as a consultant or been sufficiently assured of his nomination or appointment at the time the payments were made. See note 2, *supra.* In any event, the fact that the reach of Sections 209 and 201 might not precisely coincide at the margins (due to their different drafting histories) does not warrant a construction of Section 209 that altogether excludes payments made prior to the formal commencement of federal service.

[27] Because most of the relevant OLC opinions are unpublished, they were appended to the government's brief in the court of appeals and are appended

which has statutory authority to render advisory opinions on ethics matters (5 U.S.C. App. 402(b)(8)), has also made clear that a severance payment is lawful only if the recipient is being compensated for past services to the company, not future services for the government, and if persons entering federal service are not singled out for special treatment. See Ops. O.G.E. 81 × 16 (1981), 85 × 11 (1985) (App., *infra*, 51a-55a).[28]

to this brief as well. The OLC opinions are cited principally to rebut petitioners' suggestion that the government adopted its position recently and to ensure that the Court has all relevant materials (and may give them whatever weight they warrant), rather than in an attempt to bind petitioners to the holdings in the opinions. The individual petitioners contended in their reply brief at the petition stage (at 5) that under 5 U.S.C. 552(a)(2), no reliance can be placed on these OLC opinions because they were not indexed and made available to the public for inspection and copying. However, OLC opinions are exempt from that requirement by virtue of 5 U.S.C. 552(b)(5). Courts frequently refer to such agency counsel opinions where relevant to the issues before them. See, *e.g.*, *Greentree* v. *U.S. Customs Service*, 674 F.2d 74, 84-85 (D.C. Cir. 1982); *Symons* v. *Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 243 n.7 (D.C. Cir. 1981); *NTEU* v. *Reagan*, 663 F.2d 239, 251 n.19 (D.C. Cir. 1981).

Petitioners rely (Individ. Br. 24-25) on the statement in the Attorney General's 1963 interpretative memorandum that Section 209 "uses much of the language of the former 18 U.S.C. 1914 and does not vary from that statute in substance." *Memorandum Regarding Conflict of Interest Provisions of P.L. 87-849* (Feb. 1, 1963), 18 U.S.C. 201 note. That general statement appears to address the nature of the payments that are barred (see page 37, *infra*), not the distinct issue presented here. Moreover, because Section 1914 apparently was understood by this Department to apply to pre-employment payments, the language quoted from the Attorney General's 1963 memorandum is consistent with a similar reading of Section 209(a). The longstanding position of OLC also demonstrates that this general language in the Attorney General's 1963 memorandum was not understood to exempt such payments.

[28] Petitioners refer to annual payments to be made to Deputy Secretary of Labor Roderick DeArment by his former law firm and a $200,000 severance payment made to Deputy Secretary of State Lawrence Eagleburger. See Individ. Br. 22-23 n.16, citing *U.S. Allows Long-Term Severance Pact*, Wash. Post, May 20, 1989, at A11, col. 4, and *Scowcroft's '88 Income Was $500,000*, Wash. Post, Mar. 14, 1989, at A7, col. 1. The public account of the former arrangement makes clear that the payments are made pursuant to an existing plan, based on past services to the firm. We have been informed by the Office of Government Ethics that it approved the payment to Deputy Secretary Eagleburger because it was satisfied that the payment was made as compensa-

d. Nor are petitioners correct in contending that the purpose of Section 209(a)—to assure the independence and undivided loyalty of federal officials—does not support its application to lump-sum "severance" payments made prior to formal commencement of federal service. As in the case of a bribe, Congress obviously concluded that an advance payment can be presumed to have a lingering effect on the recipient when he performs his official duties. Furthermore, the compelling interest in preserving public confidence in the integrity of government officials would be undermined if the parties could so easily circumvent the statutory prohibition against private supplementations of salary.[29]

Petitioners also argue (Individ. Br. 25-28) that Section 209(a) should be construed not to apply here in order to facilitate government recruitment of qualified personnel. Congress, however, carefully weighed the competing needs for qualified personnel and to assure integrity, and it struck what it believed to be the appropriate balance. It chose not to carve out a blanket exception for all "severance" payments, including those made as compensation for the recipient's federal service. The absence of such an exception is especially significant in view of other express exceptions Congress included in Section 209.[30]

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tion for his past services to Kissinger Associates, not in consideration of his accepting a government position.

[29] Petitioners err in citing *United States* v. *Muntain*, 610 F.2d 964 (D.C. Cir. 1979), and *United States* v. *Raborn*, 575 F.2d 688 (9th Cir. 1978), for the proposition that "Congress intended Section 209 to be limited to incumbent federal officials" (Individ. Br. 25 n.18). *Muntain* merely held Section 209 inapplicable because the payments were made for an outside job that the defendant performed while on annual leave and that had no connection to his official duties. *Raborn* involved defendants who concededly were government employees, and the Ninth Circuit, in that context, observed that the statute "prohibits * * * an officer or employee of the executive branch" from receiving any supplementation of salary. 575 F.2d at 691-692.

[30] The statute contains exceptions for special Government employees, who serve less than 130 days annually, 18 U.S.C. 202 (18 U.S.C. 209(c)); employees serving without compensation (18 U.S.C. 209(c)); payments made by state and local governments (18 U.S.C. 209(a)); certain travel and moving expenses (18 U.S.C. 209(d) and (e)); and certain payments to employees injured while protecting the President (18 U.S.C. 209(f)).

Most importantly, at the urging of the New York City Bar Association (*N.Y. Bar Report* 217-218), Congress sought to mitigate financial hardship by allowing persons entering the government to continue to participate in "bona fide" employee welfare or benefit plans maintained by their former employers. 18 U.S.C. 209(b). But Congress made no further exception permitting supplementations of federal salaries by lump-sum "severance" payments from former employers that are not based on benefit plans of general applicability. Moreover, recognizing that a particular need for highly qualified personnel for defense purposes might warrant exemption from the prohibition against outside compensation, Congress enacted special authority for the President to grant exemptions in certain circumstances. See 50 U.S.C. App. 2160(b)(4).[31] This narrow provision further contradicts petitioners' efforts to fashion a broad exemption for defense (and other) personnel who do not qualify under it.

Nor are the individual petitioners persuasive in relying (Br. 28-32) on common-law principles of agency. The short answer is that Congress did not incorporate common-law principles in Section 209. In any event, Section 209 does not impose an all-inclusive duty of undivided loyalty on a person who has not yet begun federal employment. He is free, for example, to work for a private employer whose interests directly conflict with those of the United States. Section 209 imposes a duty on him only with respect to his prospective federal employment, by barring the receipt of private compensation for that employment. This limited prohibition is directly related to (and serves to maintain the integrity of) the prospective federal employment (cf. *United States* v. *Hood,* 343 U.S. 148, 150-151 (1952)), and it affects only payments that would not have been made but for that employment. Even the common law imposes some fiduciary duties on a person who has not yet become an agent. For example, "[a] per-

[31] For other special exemptions from 18 U.S.C. 209, see 5 U.S.C. 3343(e) (expenses of employees detailed to international organizations); 45 U.S.C. 362(h) (employers and employees assisting the Railroad Retirement Board); 7 U.S.C. 2220 (employees engaged in agricultural or Forest Service cooperative extension programs); 8 U.S.C. 1353c (reimbursement for services of immigration officers inspecting aliens in foreign countries).

son who, in view of a prospective agency, invites a confidence from or permits the prospective principal to reveal confidential information to him, is subject to the same duties with respect to such information as if, at the time the confidence was given, he were in fact an agent." Restatement (Second) of the Law of Agency § 395, comment d (1958). The comparably limited duty of loyalty to the prospective employer under Section 209 scarcely "stretch[es] beyond recognition the fundamental principles of agency law," as petitioners argue (Individ. Br. 28).

3. *The Payments Constituted "Compensation For" The Recipients' Federal Service Within The Meaning of Section 209(a)*

Petitioners' contention (Individ. Br. 43-49; Boeing Br. 17-26) that the payments were not made as "compensation for" the recipients' federal services is premised on an erroneous legal view of Section 209(a) and ignores the overwhelming evidence that the statute was violated.

a. Section 209(a) refers to supplementations of salary made "as compensation for" the recipient's services to the United States in order to identify the payments to be barred. Absent some such limitation, any cash payment or other transfer of economic value to a federal employee might fall within the reach of the statute, because it would "supplement" the recipient's federal salary in the sense of being available for him to spend during the period of his federal service. Such a rule could forbid a federal employee from receiving gifts from family members or friends, income from investments, or salary earned in an outside job. That result would not only be unfair to federal employees and inhibit recruitment (see Manning, at 164), it would also extend far beyond the statutory purpose of assuring the independence and undivided loyalty of federal employees in performing their duties. Accordingly, Section 209(a) prevents only those private supplementations of salary that are "directly linked" to the recipient's federal employment (Manning, at 171). As we shall now show, the history of Section 209 establishes that the role of the "as compensation for" language is to interpose that limiting principle. Contrary to the apparent view of petitioners and the district court (Pet. App. 20a), that phrase does

not have the further effect of rendering Section 209 one of those rare criminal statutes requiring proof of specific intent.

b. The former Section 1914 used different language of limitation, but its purpose was the same. Section 1914 made it unlawful for a government official to receive any salary "in connection with" his services to the government. The Attorney General interpreted this language in a 1942 opinion (40 Op. A.G. at 190):

> The statute clearly covers a salary received from a private person or source if it is paid or received as compensation or part compensation for the services rendered to the Government. It has also been held to apply if the officer or employee renders the same or similar services to both the Government and a private person (33 Op. A.G. 273 [1922]). It does not, however, prohibit payment for services rendered exclusively to private persons or organizations and which have no connection with the services rendered to the Government.

See also 42 Op. A.G. 111, 126 (1962); Manning, at 166-168.

The "in connection with" language was, however, imprecise and capable of unduly broad interpretation. *N.Y. Bar Report* 212-213. For example, it seemed to encompass payments for services performed outside the scope of the recipient's government employment but related to its subject matter, such as compensation received by a government tax auditor who, on his own time, helped a third party with his taxes. See *United States* v. *Gerdel,* 103 F. Supp. 635, 638-639 (E.D. Mo. 1952). As the New York City Bar Association pointed out: "Clearly an outside source may not, consistently with Section 1914, pay the government official 'to' take the government job or 'for' his government work. But may a former employer make *any* payment to the employee that will not raise the inference that it was made 'in connection with' his governmental duties?" *N.Y. Bar Report* 65 (emphasis in original). At the same time, the prohibition was "peculiarly susceptible of evasion," because the basis for a payment might not be objectively ascertainable (*Staff Report* 44) and because almost any payment could be characterized as

being "in connection with" past services rather than government employment (*N.Y. Bar Report* 65-66).

After canvassing the Attorney General opinions construing Section 1914, the House Judiciary Committee's *Staff Report* concluded in 1958 that "[s]alary payments avowedly designed to supplement Government salary or as donations to the Government have been held unlawful." *Id.* at 44, citing 31 Op. A.G. 470 (1919); 33 Op. A.G. 273 (1922); 40 Op. A.G. 265 (1943).[32] By contrast, "payments in connection with leave with pay from the faculty of a privately endowed engineering school were held to have been made, not in consideration of the performance of Government services in the period of leave, but in consideration of past service to the private employer." *Staff Report* 44, citing 39 Op. A.G. 501 (1940).

In an "effort to provide for a clearer and more predictable standard linking the payments and the employee's job" (*N.Y. Bar Report* 212), the New York City Bar Association recommended two changes in the prohibition then contained in Section 1914. First, it recommended an exception, ultimately enacted in 18 U.S.C. 209(b), permitting a federal official to continue to participate in an employee welfare or benefit plan maintained by a former employer, provided that the plan is "bona fide." This exception categorically resolved uncertainties under prior law in applying the "in connection with" standard to benefits received under such plans. Moreover, the requirement under Section 209(b) that the payments be made pursuant to a pre-existing plan in which the departing employee is already participating served to minimize the possibility that persons entering federal employment might be singled out for favorable treatment. *N.Y. Bar Report* 65, 217-218; Perkins, 76 Harv. L. Rev. at 1139-1140; Manning, at 171; *1960 Hearings* 821; *1961 Hearings* 62; *1962 Hearing* 22, 46-47.

Second, the Bar Association recommended that the "in connection with" language in Section 1914 be replaced with

[32] Accord, *International Ry.* v. *Davidson*, 257 U.S. 506, 515 (1922); 2 Comp. Gen. 775 (1923); 18 Comp. Gen. 460 (1938); 26 Comp. Gen. 15, 17-18 (1946); 29 Comp. Gen. 163, 167 (1949); 36 Comp. Gen. 135 (1956).

language barring payments "for or in consideration of" federal government service. *N.Y. Bar Report* 286. The Justice Department recommended the same change, in order "to emphasize the intent that the prohibition is against private payment made expressly for services rendered to the Government." *1961 Hearings* 42. Congress accepted these recommendations, but used different language to achieve the same result. Section 209(a), as reported by the House Judiciary Committee and finally enacted, bars supplementations of salary "as compensation for" the recipient's services to the government; but, echoing the Justice Department's explanation of the phrase "in consideration of," the House Report stated (at 24-25) that the change emphasized that "the prohibition is against private payment made expressly for services rendered to the Government."

At bottom, Congress's substitution of the phrase "as compensation for" did not change the scope of the prohibition in the former Section 1914; instead, as the Senate Report explained (at 14), it "reenact[ed] [that] prohibition in substance," albeit using language that "is more precise in expressing what is clearly intended by the present broad phrase." That also was the considered judgment of the Attorney General, who opined immediately after Section 209 was enacted that it "does not vary from [Section 1914] in substance." *1963 Memorandum*, 18 U.S.C. 201 note; accord, Perkins, 76 Harv. L. Rev. at 1138 & n.87. Section 209 therefore should be understood to have codified the Attorney General's interpretations of former Section 1914, under which payments that are "avowedly designed to supplement Government salary" are barred. *Staff Report* 44. And by making clear that the requisite "connection" between the payment and the public employment is that the former is made "as compensation for" the latter, the revised language establishes that the prohibition includes all arrangements where the anticipated public employment is the consideration for the payment in the classic contract sense. Similarly, the fact that the legislative history equates "as compensation for" with "in consideration of" indicates that Section 209 is also implicated where public employment is the "but for" cause of the payment.

c. Several important principles informing the interpretation of Section 209 emerge from the derivation of the phrase "as compensation for"—principles establishing that the payments here violated the statute. Of course, the usual severance payment—made solely on the basis of past services rendered to the employer, without reference to the anticipated future status or activities of the departing employee—is lawful under Section 209. Perkins, 76 Harv. L. Rev. at 1138-1139. But here, the payments were "directly linked" to the anticipated federal employment of the recipients (Manning, at 171), not their past services to Boeing. Section 209(a) does not permit such an arrangement.

i. Although the payments here were labeled "severance payments," they had little to do with the recipients' services to Boeing. Instead, as the calculations made by both Boeing and the recipients show, the payments were "avowedly designed to supplement Government salary" (*Staff Report* 44). Such a payment is by its nature "compensation for" the recipient's services to the federal government, and the requisite connection between the payment and those services is established as a matter of law. Indeed, a major element of petitioners' calculations was the difference between the individual's federal salary and benefits and the higher salary and benefits he would have been paid by Boeing. Such differentials are unquestionably "supplementations of salary" within the meaning of Section 209(a). It also is firmly established that moving expenses and cost-of-living allowances paid solely because of the recipient's federal service are prohibited "supplementations of salary" for purposes of Section 209(a). See pages 20-23, *supra*. Because the payments at issue here were avowedly designed for these purposes, they were, by definition, "compensation for" the recipient's services as a federal official.[33]

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[33] The word "compensation" connotes not only payment for services rendered, but also "recompense" and "something that makes up for a loss" (*Webster's Third New International Dictionary* 463 (1986)). By making up for the recipient's financial losses resulting from his performance of services for the federal government, payment of moving expenses and cost-of-living allowances serves as "compensation" for federal services in this sense as well.

ii. Boeing did not have an established policy of general applicability that rewarded past services to the Company by providing severance payments to all employees leaving to take any of a broad range of jobs. The uncontradicted evidence, accepted by both courts below (Pet. App. 8a, 17a-18a), showed that over a 20-year period, Boeing consistently made such payments *only* to persons who were to assume positions of responsibility with the federal government. Singling out persons entering federal service for special treatment—and making payments to them only because of their federal service—is a sufficient basis for finding the payments to be unlawful. 2 Op. O.L.C. 267, 268 (1978); 5 Op. O.L.C. 150, 151 (1981); Op. O.G.E. 81×16 (1981) (App., *infra*, 51a-52a); 45 Comp. Gen. 308, 312 (1965).[34] Indeed, Boeing did not have a uniform policy of making "severance" payments even to all persons who left to work for the federal government. Instead, Boeing decided on a case-by-case basis whether the particular position warranted a payment and what its amount should be. J.A. 280-283.

The statutory relevance of the payor's singling out federal employees and retaining discretion is shown by the exception in Section 209(b) permitting continued participation in a bona fide pension, retirement or other benefit plan. That exception's requirement that the plan be one of general applicability in which the departing employee is already enrolled serves to guard against favored treatment for federal employees as a class and against discretionary payments that have an inherent propensity to be made and accepted as special rewards to individual federal officials. See page 36, *supra*.

iii. Also significant is whether the payor has an interest in the recipient's governmental duties or a sensitive relationship

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[34] See Perkins, 76 Harv. L. Rev. at 1139:

> The sole test should be, we submit, the factual one of whether the payment is made in consideration of past services. To test its own intent, the board of directors of the corporation from which the executive is departing should ask itself: would we make the same severance payment if the corporate executive were leaving, with no idea of returning, to accept the presidency of a college or of a charitable foundation, or to enter the ministry?

with his employing agency. See 41 Op. A.G. 217, 221 (1955); 31 Op. A.G. 470 (1919); 45 Comp. Gen. 308, 312 (1965); *Staff Report* 44-45; Manning, at 164-165; McElwain & Vorenberg, 65 Harv. L. Rev. at 967; Davis, 54 Colum. L. Rev. at 904-905; Dembling & Forrest, 20 Geo. Wash. L. Rev. at 191-192. Although Section 209(a) applies to all payors who make a prohibited payment, even those who are unaffected by the agency's work, the existence of a sensitive relationship between the payor and the agency creates a distinct likelihood that the recipient's federal services are (or would be perceived to be) consideration for the payment, and it triggers the concern about divided loyalty (or the appearance thereof) that gave rise to enactment of the prophylactic prohibition against outside compensation.

This factor has particular relevance here. Boeing is a large defense contractor, and it therefore has a significant interest in the affairs of the Defense Department generally. Furthermore, although the individual petitioners did not have procurement or contracting responsibilities in the Defense Department, they were involved in crucial areas of research and development and long-range defense planning that were of obvious interest to Boeing because of their impact on future weapons policies and systems. The record demonstrates that those considerations in fact played a role in Boeing's decision to subsidize the government positions at issue here. The President of Boeing Aerospace stated in recommending the payment to Crandon that Crandon would "be an asset to Boeing in the NATO arena" (J.A. 284). A Boeing document supporting the payment to Kitson stated that his "job with the DOD is viewed as bigger than Crandon's—& has greater influence relative to [Boeing Aerospace]" (J.A. Lodging No. 18). The President of Boeing Aerospace recommended Reynold's payment because he would "hold a *key* job" (J.A. Lodging No. 17). And he recommended Jones' payment because, inter alia, "having someone with his views will be helpful to us *while* he is in Washington" (J.A. 277).

iv. Finally, the district court found that the payments were made to encourage Boeing employees to accept government positions (Pet. App. 17a); the court of appeals agreed, noting that "Boeing's stated purpose in making the payments was to en-

courage public service by lessening the financial penalties involved in accepting government employment" (*id.* at 8a); and petitioners concede in this Court that the purpose of the payments was "to encourage public service by decreasing the financial penalties incurred by employees who left the employ of Boeing to enter public service" (Boeing Pet. 5; see also Boeing Br. 24; Individ. Br. 25-26). Because Boeing effectively paid the individual petitioners to accept their positions in the Department of Defense, those payments were, under Section 209(a), "compensation for" the services that they would perform in those positions: "Clearly an outside source may not, consistently with Section 1914, pay the government official 'to' take the government job" (*N.Y. Bar Report* 65).

In sum, on the basis of the undisputed evidence and the district court's factual findings, all of the factors that render a payment a prohibited "supplementation of salary" as "compensation for" the recipient's government services within the meaning of Section 209(a) are present in this case. Contrary to the individual petitioners' contention (Br. 18), this is not a novel application of the statute. This result and supporting analysis are fully consistent with principles that the Department of Justice has applied for many years in considering the legality of severance payments (see App., *infra*, 3a-50a) and that have been widely recognized in the literature.

d. Petitioners nevertheless seek to avoid liability by arguing that they did not "intend" to make and receive the payments as supplementations of federal salaries or as compensation for the recipients' government services. In petitioners' view, the phrase "as compensation for" in Section 209(a) requires a showing of "specific intent"—a showing that the payment were made and received for the *purpose* of compensating the recipients for their federal service. We disagree. As we have explained, the phrase "as compensation for" is designed to identify the nexus that must exist between the payment and the federal services, not to state an elevated standard of *mens rea*. The quoted phrase does not use language of intent, and Section 209(a) as a whole is silent on that question. We do not suggest that Section 209(a) thereby prescribes no element of intent. Cf. *Liparota* v. *United*

States, 471 U.S. 419, 425 (1985). But, in light of the silence in the statutory text, Section 209(a) should not be interpreted as one of those rare criminal statutes that requires a showing that the defendant acted with the purpose—the "conscious object"—of producing the particular effect that the statute proscribes. *United States* v. *Bailey*, 444 U.S. 394, 404 (1980). In accordance with ordinary rules of construction, it is sufficient to prove that the defendant acted with knowledge of the probable consequences of his actions. Compare *Bailey*, 444 U.S. at 402-409; *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438-446 (1978). Such a rule comports with the purpose of Section 209 of preventing not only actual corruption, for which a showing of specific intent might be required (see 18 U.S.C. 201), but also real or apparent conflicts of interest that undermine public faith in the integrity of government. See *Mississippi Valley*, 364 U.S. at 560-561. Accordingly, criminal liability is established under Section 209 upon proof that the defendant knowingly made or received payments having the characteristics that render them "supplementations of salary" and "compensation for" services performed as a federal official within the meaning of Section 209(a). See *Muntain*, 610 F.2d at 969. *A fortiori*, a showing of specific intent is not required in a civil case, in which a party ordinarily is presumed to have intended the natural consequences of his acts. *Clarion Bank* v. *Jones*, 88 U.S. (21 Wall.) 325, 337 (1875).

As we have explained, under the undisputed evidence and findings in this case, the payments at issue here were, as a matter of law, "supplementations of salary" made "as compensation for" federal services within the meaning of Section 209(a), because they were specifically designed to augment the recipients' income and mitigate financial sacrifices associated with federal employment; the recipients' anticipated federal employment was the reason for the payments; the payments were regarded as inducements to accept the federal positions; and Boeing had an interest in those positions. Regardless of whether each was aware of all the details of the payments' calculation, there is little doubt that the recipients and responsible Boeing officials were aware of the essential nature of the payments that rendered

them unlawful under Section 209.[35] That is all that is required to establish liability.

Hence, petitioners err in relying (Individ. Br. 46; Boeing Br. 17-18) on the district court's conclusory findings regarding intent (Pet. App. 20a). The essential nature of the payments as supplementations of federal salary and compensation for federal services under Section 209(a) was established as a matter of law, and petitioners were aware of the nature of the payments. It is irrelevant whether petitioner Boeing "intended" and the individual petitioners "understood" the payments to be a "supplementation" or "compensation" in whatever different sense either petitioners or the district court might have used those terms. In short, the factual "finding" on which petitioners rely rested on significant legal errors regarding the interpretation of Section 209(a) and the elements of a cause of action under it.[36] Appellate review of a factual finding for possible error in the legal premises on which it rests is not governed by the "clearly erroneous" test in Fed. R. Civ. P. 52(a). *Icicle Sea-*

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[35] The individual petitioners cite (Br. 48) testimony that they did not know how the responsible Boeing officials computed the final amount of their payments. They do not dispute, however, that they submitted worksheets computing the financial loss that would result from entering government service. Because, from the individual petitioners' perspective, the payments clearly constituted a mechanism for making up some or all of that loss, the payments were received as "supplementation of salary" and "as compensation for" their federal services. Similarly, although Boeing cites (Br. 24) the district court's finding that its chief executive officer (Mr. Wilson), who gave final approval to the payments, did not know the "specific calculation method" (Pet. App. 20a), Boeing surely cannot avoid liability on that basis. Mr. Wilson knew that the payments were to be made only because of the recipients' anticipated federal service, and he approved the recommendation of responsible Boeing officials who concededly utilized a method of calculation that, in itself, rendered the payments unlawful under Section 209. In any event, Mr. Wilson was aware that the calculations were based in part on the salary differential and moving expenses, which sufficiently informed him that the payments had characteristics that rendered them unlawful. See pages 5-7, *supra*.

[36] For example, the district court was of the view that all "severance" payments are per se lawful under the statute and that "the formula for calculation of severance pay cannot make the payment something other than severance pay" (Pet. App. 26a).

foods, Inc. v. *Worthington*, 475 U.S. 709, 714 (1986).[37] For similar reasons, petitioners err in relying (Individ. Br. 47-48; Boeing Br. 22-23) on the testimony by the recipients and Boeing officials that might have been the basis for the district court's finding with respect to their intentions and understandings.

In any event, the court of appeals found the record overwhelmingly inconsistent with the witnesses' self-serving testimony and the district court's conclusory findings on these points.[38] This is not a case where a witness "has told a coherent and facially plausible story that is not contradicted by extrinsic evidence." *Anderson* v. *Bessemer City*, 470 U.S. 564, 575 (1985). Rather, as this Court has stated (*ibid.*):

> Documents or objective evidence may contradict the witness' story; or the story itself may be so internally incon-

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[37] Petitioners also assert that the district court "found" that the payments were made "to sever the relationship with these employees *based on past performance* and accumulated benefits" (Individ. Br. 46, quoting Individ. Pet. App. 25a (emphasis added by petitioners)). The quoted statement, however, appears in the district court's "Conclusions of Law," not its "Findings of Fact." Moreover, although the recipients' past services to Boeing obviously furnished an occasion for making the payments – Boeing presumably would not make such payments to persons having no affiliation with the Company – the triggering event for the payments and the basis of their calculation was the recipients' anticipated federal employment.

In any event, petitioners' ties with Boeing were severed through their receipt of separate checks reflecting the value of accrued benefits to which every other terminating employee would be entitled. By contrast, the overwhelming percentage of each individual's payment request to Boeing consisted of *future* financial losses. The submissions also included the amounts of Boeing contributions to benefit plans that were accrued but unvested at the time of termination, and the value of stock options that were granted in the year before termination. But because these benefits otherwise would have been lost when they left the Company, it was not necessary for the individuals to receive cash payments for them in order to "sever" their ties. The value of those two items also was relatively small in relation to the total payments. See pages 4-5, *supra*.

[38] This Court has held in civil cases that self-serving declarations by a party as to his intent, unsupported by any extrinsic evidence and contradicted by objective facts, may be found to be insufficient as a matter of law to justify a verdict on behalf of that party. See, *e.g.*, *United States* v. *Generes*, 405 U.S. 93, 106-107 (1972); *United States* v. *Union Pac. R.R.*, 226 U.S. 61, 92-93 (1912); *District of Columbia* v. *Murphy*, 314 U.S. 441, 449, 456 (1941).

> sistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

In this case, the court of appeals was properly " 'left with the definite and firm conviction that a mistake ha[d] been committed.' " *Id.* at 573 (citation omitted).

II. THE UNITED STATES IS ENTITLED TO RECOVER THE AMOUNT OF THE PAYMENTS IN THIS ACTION

The court of appeals correctly held that the United States has a civil cause of action to require the individual petitioners to disgorge the payments they received in violation of 18 U.S.C. 209 or, in the alternative, to recover the amount of the payments from Boeing (to the extent recovery is not time-barred). Pet. App. 5a-6a, 8a-9a, 10a-11a. A conflict-of-interest statute such as Section 209 is "evidence of the precise nature of th[e] fiduciary duty" owed to the United States (*United States* v. *Kenealy,* 646 F.2d 699, 703 (1st Cir.), cert. denied, 454 U.S. 941 (1981)), and breach of the statutory standard "will establish, as a matter of law, [the agent's] breach of fiduciary duty owed the United States." *United States* v. *Podell,* 436 F. Supp. 1039, 1042 (S.D.N.Y. 1977), aff'd, 572 F.2d 31 (2d Cir. 1978). See *Mississippi Valley,* 364 U.S. at 560-561. Where an employee has received payments relating to his official duties in violation of a fiduciary obligation owed to the United States, he must account for the proceeds to the United States. See *Snepp* v. *United States,* 444 U.S. 507, 514 (1980); *United States* v. *Carter,* 217 U.S. 286, 305 (1910); *United States* v. *Kearns,* 595 F.2d 729 (D.C. Cir. 1978); *United States* v. *Drumm,* 329 F.2d 109, 113 (1st Cir. 1964); Restatement of Restitution § 197 comment c (1937).[39] And where a third party, such as Boeing, has inter-

[39] This remedy was ordered in the one other civil action based on Section 209. *United States* v. *Pezzello*, 474 F. Supp. 462, 463 (N.D. Tex. 1979). See also *N.Y. Bar Report* 56 (discussing Comptroller General decisions stating that payments received in violation of former Section 1914 may be collected by deduction from employee's pay); see, *e.g.*, 30 Comp. Gen. 246, 250 (1950).

fered with an individual's fiduciary duty to the United States by making an illegal payment, the United States has a cause of action for damages against that party—especially where, as here, the payor's conduct separately contravenes the standards in a conflict-of-interest statute. *Continental Management, Inc.* v. *United States*, 527 F.2d 613 (Ct. Cl. 1975).

Petitioners do not dispute that the United States has a civil cause of action to recover illegal payments made to its employees.[40] But the individual petitioners argue (Br. 32-43) that "disclosures" of the payments they claim to have made on their financial-disclosure forms (SF-278s) excuse them from any duty to account to the United States for the payments. This waiver argument was correctly rejected by the court of appeals. Pet. App. 9a-10a.[41]

Unlike other conflict-of-interest laws, Section 209 includes no general provision for a waiver. Compare 18 U.S.C. 207(f), 208(b). When the revision of the conflict-of-interest laws was before Congress, the Department of Defense recommended that the proposed Section 209 include a general provision permitting an agency head to grant exemptions by written order, but Con-

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[40] Boeing argues (Br. 26-32) that it is not liable because there was no "actual conflict of interest," but only an "appearance" of improper activity. This argument reflects a fundamental misconception: the statute is not addressed solely to appearances. Section 209 is a conflict of interest statute "[i]n the strictest sense" (*N.Y. Bar Report* 55), as was 18 U.S.C. 434 (1958), at issue in *Mississippi Valley*. "The employee does not have to *do* anything improper in his office to violate the statute" (*N.Y. Bar Report* 55-56), and specific corruption likewise is not an element of the payor's offense under 18 U.S.C. 209(a). Because the harm caused by payments made in violation of Section 209(a) is "uncertain in its mathematical calculation," and nominal damages will deter no one, the amount of the payment is the proper measure of damages. *Continental Management*, 527 F.2d at 619; see also *Snepp*, 444 U.S. at 514-515. Finally, contrary to petitioners' contention (Individ. Br. 26-27), the government did not "concede" or "stipulate" that no conflict of interest or breach of fiduciary duty occurred. See Br. in Opp. 18 n.11.

[41] To support their claim of waiver and certain other arguments, petitioners rely on affidavits attached to their motions for summary judgment. See J.A. 44-82. The affidavits are hearsay, Fed. R. Evid. 801(c), could not have been admitted into evidence, Fed. R. Evid. 802, and do not constitute a part of the trial record that forms the basis for the district court's opinion.

gress declined to adopt that proposal. *1960 Hearings,* at insert following p. 583. And although Congress authorized the President to grant waivers to certain highly qualified personnel needed for the defense effort (see 50 U.S.C. App. 2160(b)(4)), petitioners have not been granted a waiver under that provision.

In light of the absence of any statutory authority for exempting petitioners from Section 209, petitioners' contention that their alleged disclosures on their SF-278s exempt them from liability is flatly inconsistent with *Mississippi Valley.* There the Court held that a government official's alleged knowledge of his subordinate's conflict of interest did not excuse the subordinate from the disqualification requirements of 18 U.S.C. 434 (1958). Noting that neither Section 434 nor any other statute granted the superior official the authority to exempt the subordinate, the Court concluded that it would be contrary to the statutory purposes for the Court to fashion an exempting power that Congress had withheld. 364 U.S. at 561. In the Court's view, Congress "recognized that an agent's superiors may not appreciate the nature of the agent's conflict, or that the superiors might, in fact, share the agent's conflict of interest," and the prohibition therefore was "designed to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents." *Ibid.*; see also *id.* at 566; *United States* v. *Medico Indus., Inc.*, 784 F.2d 840, 845 (7th Cir. 1986). As in *Mississippi Valley,* it would be contrary to the purposes of Section 209 for the Court to fashion an exempting authority that Congress withheld. That result would permit petitioners to retain the proceeds of conduct that violated a criminal statute and would unjustly enrich petitioners by excusing them from their duty to account to the United States for payments that they received for their government service and that therefore belong to the United States. Cf. *Caplin & Drysdale* v. *United States,* 109 S. Ct. 2646, 2652-2655 (1989).

There is another legal defect in petitioners' reliance on their SF-278s in claiming an exemption from liability under 18 U.S.C. 209. The regulations governing the financial disclosure program, which were issued by the Director of the Office of Government Ethics pursuant to statutory authority, 5 U.S.C.

App. 402(b)(1), expressly provide that the filing of a financial disclosure report does *not* exempt a government official from applicable statutory prohibitions. 5 C.F.R. 734.104(a)(6).[42] Accordingly, to exempt the individual petitioners from liability based on financial disclosure reports filed under the Ethics in Government Act would be contrary to that Act and implementing regulations, as well as Section 209 itself.

In any event, the factual predicate for petitioners' waiver argument based on the filing of SF-278 forms is wholly lacking, because none of the SF-278s filed by petitioners mentioned a severance payment. Petitioner Crandon did not even file an SF 278 because he did not occupy a position covered by the filing requirement. Reynolds' SF-278 listed no income from Boeing (J.A. Lodging No. 24). Kitson's SF-278 contained two entries for income from Boeing: $159,530 listed as "salary," and $1100 per month listed as "retire. pay" (J.A. Lodging No. 25); his $50,000 "severance" payment was not separately disclosed, although it might have been included in the aggregate amount listed as "salary." Paisley's SF-278 listed the $180,000 he received from Boeing as "compensation for services," not as a severance payment (J.A. Lodging No. 23). Jones' SF-278 listed three items from Boeing: $68,200 in "salary"; $2,501-$5,000 from the Boeing "Financial Security Plan"; and a further $200,300, which was listed under the heading "Other (Specify)," with no accompanying explanation (J.A. Lodging No. 21).

Petitioners seek to overcome this defect by arguing (Individ. Br. 36-38) that regulations governing the completion of disclosure forms did not require them to list the severance payments separately, and that several of the individual petitioners were so informed by Defense Department personnel. That argument misses the point. Petitioners have not been penalized for violating the Ethics in Government Act's disclosure requirements. This suit was brought to require petitioners to dis-

[42] The cited regulation states: "Nothing in the [Ethics in Government] Act or this part requiring reporting of information or the filing of any report shall be deemed to authorize the receipt of income, gifts, or reimbursements, the holding of assets, liabilities, or positions, or involvement in transactions that are prohibited by law, Executive order or regulation."

gorge illegal payments. Petitioners contend they do not have to do so because they disclosed the payments on their SF-278s. The simple fact is that those forms do not identify any severance payments as such. As a result, the government officials who reviewed those forms had no occasion to pass on whether those payments were lawful. For this reason, the certification by the reviewing official on each form that "[t]he information contained in this report discloses no conflict of interest under applicable laws and regulations" does not constitute a considered opinion that the severance payments were lawful, as petitioners urge. See Individ. Br. 36.[43]

Petitioners rest their waiver argument on common-law principles that an agent must account to his principal for "secret" payments received in connection with his employment. See *United States* v. *Carter, supra.* The standards that petitioners

[43] The individual petitioners also rely (Br. 40) on the district court's finding that Jones and Paisley disclosed the fact and amount of the severance payments to certain Defense Department officials. Pet. App. 21a. However, not all payments labeled as "severance" payments are either lawful or unlawful under Section 209. Petitioners do not allege that Paisley and Jones disclosed to Defense Department personnel the essential characteristics that rendered the payments at issue here unlawful. Moreover, although petitioners argue that Paisley and Jones received informal assurances that they could accept the payments, they neither requested nor received a formal written opinion to that effect from the Designated Agency Ethics Officer for the Department of Defense, the only Department official authorized to decide that question. See 32 C.F.R. 40.5(b). See also 5 U.S.C. App. 402(b)(8) (OGE advisory opinions). Inexplicably, the individual petitioners also rely (Br. 42) on disclosures made by Boeing in 1981 to the Defense Contract Audit Agency (DCAA) about the nature of its severance-pay practice. Those disclosures were made only after Boeing charged the first three of the payments at issue here to the government and after the DCAA questioned the basis for the payments.

Boeing also argues (Br. 35) that "disclosures" insulate it from liability. Although the record contains some correspondence on the subject (J.A. 541-583), the payments for the most part are not described in much detail. Moreover, a 1973 letter from a Boeing official to the General Counsel of the Air Force states that a Boeing employee had been told by a Defense Department official that a severance payment might violate Section 209 if it was based on the difference between the employee's Boeing and federal salaries (J.A. 542). The record contains no response to that letter or any other document stating that Defense Department officials formally approved payments having the characteristics that render those at issue here unlawful.

violated here, however, are prescribed by an Act of Congress, not the common law. Section 209(a) prohibits all supplementations of salary as compensaton for federal services, not merely those that are "secret." Although a court might apply common-law principles in a cause of action by the United States in the absence of statutory guidance, Congress may displace or expand upon the common law, and it has done so here. Compare *Milwaukee* v. *Illinois,* 451 U.S. 304, 313-314 (1981). In any event, even under common-law principles, an agent is not excused from liability in the absence of "full disclosure." As the court of appeals recognized (Pet. App. 9a), "full disclosure" entaiis a "complete" account of all relevant facts to the government official given "clear actual authority" by statute or regulation to waive the statutory requirement, and an "official response" from that official explicitly waiving the conflict. *United States* v. *Kenealy,* 646 F.2d at 705. Cf. *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938) ("intentional relinquishment of a known right"). Petitioners satisfied none of those requirements. In sum, there was no waiver, or basis for waiver, here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1989

APPENDIX A

STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. 209 (1982 & Supp. V 1987) provides:

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of the Government Employees Training Act (Public

Law 85-507, 72 Stat. 327; 5 U.S.C. 2301-2319, July 7, 1958).

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: *Provided*, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty-five days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and which is exempt from taxation under section 501(a) of such Code.

2. 18 U.S.C. 1914 (1958 ed.), which was the predecessor to 18 U.S.C. 209(a), provided:

Whoever, being a Government official or employee, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether a person, association, or corporation, makes any contribution to, or in any way supplements the salary of, any Government official or employee for the services performed by him for the Government of the United States—

Shall be fined not more than $1,000 or imprisoned not more than six months, or both.

APPENDIX B

Opinions of the Office of Legal Counsel

2 Op. O.L.C. 267 (1978)

November 29, 1978

78-62 MEMORANDUM OPINION FOR THE DIRECTOR, PRESIDENT'S COMMISSION ON WHITE HOUSE FELLOWSHIPS

Supplementation of Salary of Government Employees (18 U.S.C. § 209)—Propriety of Employer Providing Certain Benefits to Employee Serving as a White House Fellow

This responds to questions raised by your Office and the General Counsel of an Executive department regarding certain benefits an employer proposes to make available to one of its employees in connection with service as a White House Fellow. The suggested arrangements are embodied in the employer's guidelines on leave of absence contracts for its employees on temporary Government assignments. We are unable to accept as legally permissible a number of its features.

Apparently, the most important aspects of the proposed arrangement from the employee's point of view are those providing for the employer to reimburse her for the cost of temporary living quarters while in Washington and for travel to her home during the year. We understand that her husband will continue to work in New Jersey and live in their home there during the year. The employee points out that her husband's desire to keep his present job and his resulting inability to move to Washington will occasion the trips home, and likewise prevent her from renting the house in New Jersey thereby avoiding lodging expenses for the family in two locations. While we sympathize with the employee's situation, we do not believe that these special arrangements are permissible under 18 U.S.C. § 209.

Whatever the reasons, the decision of the employee to reside in two different locations is a personal one. As a legal matter, § 209, in our opinion, prohibits a private employer from providing at its expense a Federal employee with travel for personal reasons where, as here, that travel is furnished on account of the

employee's Federal assignment. Whether the travel is for vacation, family, or other personal reasons is irrelevant for purpose of the statute.

Similarly, we do not believe that the employee may be reimbursed for temporary living quarters in Washington. The payment of a Government employee's living expenses due to his Government service is a classic example of a supplementation of Government salary prohibited by § 209.

It has been suggested that the employer's rental of an apartment in Washington is merely a payment in lieu of the cost of moving household belongings to Washington. Because payment of moving expenses has previously been authorized by us, the argument proceeds that the payment of living expenses in Washington in lieu of moving costs should also be permitted.

We recognize that our 1976 letter to your predecessor stated that a company may pay a participant's moving expenses to the location of the fellowship assignment and back at the conclusion of the year. Upon reexamination, we no longer believe that the policy of paying all moving expenses conforms to the intent of § 209. However, we see no legal objection to the payment of the actual expenses of returning to the employer's place of business at the conclusion of the fellowship year because the payment of relocation expenses is a rather common practice in the private sector.

However, payment of expenses of moving to Washington to work for the Government presents a different question. As a rule, the Government cannot pay moving costs; newly hired Federal employees must ordinarily bear those expenses themselves. Payment of these expenses by a private firm therefore would bestow a substantial benefit on the individual. When this benefit accrues solely because of Federal service, § 209 prohibits the arrangement.

We recognize that White House Fellows enter Federal service for only a brief period with the expectation of returning to their previous employers. By § 209(c), Congress created an exception from the prohibitions in § 209(a) for special Government employees, who are persons employed or retained for not to ex-

ceed 130 out of any ensuing period of 365 days. In view of Congress' express recognition of the unique status of certain short-term employees, it is not legally possible to fashion additional exceptions administratively for other short-term employees who do not fall within that exception.

Nor do we believe that a special construction of § 209(a) is warranted in order to further the purposes of the White House Fellows program. If that program had any special statutory authorization indicating that certain outside financial assistance is permissible, then perhaps modifications in the application of § 209(a) would be warranted. But the program, which is authorized only by Executive order, warrants no implied exception to an act of Congress.

We also recognize that current participants in the White House Fellows program may have relied upon past practice in accepting moving expense reimbursement. But we would suggest that next year's participants be advised in advance of the legal restrictions identified herein.

In the interim, we are unable to extend the reasoning of the 1976 letter to other reimbursements, such as those for apartment rental in Washington. We should point out that the letter did not suggest that every participant in the fellowship program is entitled to some reimbursement from his previous employer, or that the payment can be for a variety of purposes, such as moving expenses, rent, or for some other items. Regardless of the controversy over the legality of paying moving expenses under § 209(a), the payment of a Federal employee's living expenses while in Washington is, as pointed out above, a classic example of salary supplementation and therefore § 209(a) applies.

It has also been suggested that payment of expenses for temporary quarters in Washington is no different in principle from a firm renting an employee's permanent residence which he vacates during his period of absence as a White House Fellow, which we concluded in the 1976 letter is lawful. We must disagree. When the company arranges for the rent of the permanent residence, or rents the residence itself, the employee should

be left in no better position than he would be in if he rented the residence directly to an individual tenant. For example, the employee should bear any rental or management fees entailed in the firm's renting the residence to an individual tenant; and if the arrangement provides for the firm to rent the residence and leave it unoccupied, the fair market rental should be reduced by a reasonable estimate of maintenance and other costs that forseeably will not be incurred.

Implicit in the conclusion stated in our 1976 letter that it is permissible for a company to rent the vacated permanent residence of a White House Fellow was the understanding that the arrangement must be essentially the same as though the residence were rented on the open market and that the employee will therefore not have the use of the residence during the rental period.[1] In this case, however, the family *will* have the use of the permanent residence. The employer could not, therefore, properly pay the employee the rental value of the home; this would confer a windfall that would not otherwise result. Thus, the reimbursement of temporary lodging costs in Washington cannot be justified by reference to situations in which the private employer may rent the White House Fellow's permanent residence.

Several other aspects of the employer's guidelines are also troublesome. We may question, for example, the continuation of concession telephone service provided by the company for a person in Government service. Section 209(b) permits a Government employee to continue to participate in a "bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer." It may be argued that concession telephone service is a "benefit plan" maintained by the employer. However, the purpose of § 209(b), suggested by the

[1] Also implicit was the understanding that the employee was prepared to rent the house to a tenant who would reside there, so that the employer would not be paying the employee for a residence the employee intended to leave vacant. In the latter situation, the employer's payment of rent may disguise a supplementation of Government salary.

enumeration of benefit plans in the subsection itself, is to permit persons entering Federal service to continue established security arrangements that are often essential to long-range financial planning for the family. *See* R. Perkins, *The New Federal Conflict-of-Interest Law,* 76 Harv. L. Rev. 1113, 1139-42 (1963). Concession telephone service is, we believe, far removed from this purpose.

We also note that the suggestion in the guidelines that a person returning to the employer after Government service would be entitled to vacation days in an amount equal to the difference between what he would have accrued and what he actually used (or was paid for) while in Government service is inconsistent with the advice of our 1976 letter. We continue to believe that the accrual of vacation time from a private employer under these circumstances constitutes a supplementation of salary prohibited by § 209. For similar reasons, we do not believe that the employer may pay for sick leave due to any absence on account of service over the amount accrued from the Government, as is contemplated in the guidelines. We do not, however, object to the provision for termination of the leave of absence and reinstatement on the employer's payroll in the event of a long-term absence.

In our view, a problem of salary supplementation also arises in those portions of the guidelines providing that coverage under the basic group life insurance plan and death and pension benefit plans will be calculated on the higher of the employee's Government or his private salary. Section 209(b) permits "continued participation" in a "bona fide" benefit plan maintained by a former employer. The concept of "continued participation" would appear to require that participation is to be based on the employee's private salary under all circumstances. The salary on which these figures are based must in turn be calculated without reference to Government service.

Several other features of the guidelines are unclear. It is provided that the employer will make a lump sum payment equal to the contribution that would have been made to the employer's savings plan had the employee remained on its payroll. To

whom is the lump sum to be paid? If the payment is to be made directly to the employee under circumstances in which he would not otherwise be entitled to have access to the funds, this would not appear to be "continued" participation in the savings plan. Similar questions are raised by the provision of the guidelines for payment of the cash equivalent of the Employees Stock Ownership Plan participation the individual would have earned at his previous year's salary. In both these provisions and in the provision dealing with net credited-service, we also have some doubt that an employee actually "continues" to participate in the benefit plans if he does not receive credit for the period of Federal employment until he returns to the company.

A final ambiguity concerns the meaning of the term "educational fees" in the guidelines. Some further justification of miscellaneous reentry expenses mentioned also seems necessary.[2]

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

[2] Public Law 96-174, 93 Stat. 1288 (1979), amends 18 U.S.C. § 209 by providing that it does not prohibit the payment of actual relocation expenses of participants in an executive exchange or fellowship program. *See* H. Rept. No. 96-674 (1979).

5 Op OLC (1981)

Payment of Moving Expenses as Supplementation of a Government Officer's Salary

* * * * *

May 21, 1981

MEMORANDUM OPINION FOR A PROSPECTIVE DEPARTMENT OF JUSTICE OFFICER

You have asked us to advise you concerning the propriety of the proposed payment of your moving expenses by your present employer, University X, in anticipation of your nomination, confirmation, and service as an officer of the Department of Justice. We understand that during your tenure as an officer of the Department you would be on a leave of absence from the University, and that the payment of your moving expenses would be made pursuant to the University's "Professional Development Program." You have provided us with the portions of the University handbook that describe this program, and by letter you have described your school's policy and practice in administering the program. In light of this information, upon which we have relied, we conclude that the proposed pay-

ment of moving expenses[1] is acceptable under 18 U.S.C. § 209 and under this Department's Standards of Conduct, 28 C.F.R. Part 45.

As you know, 18 U.S.C. § 209 prohibits a government employee from accepting "any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch." It is our view that the payment of moving expenses may constitute a supplementation of salary within the purview of § 209, if the payment is made "as compensation for" federal employment. *Cf.* § 209(e). On the other hand, if the payment is made for past or future services to a private employer, without regard to the recipient's governmental duties, then it would not be prohibited by § 209. *See, e.g.*, 41 Op. Att'y Gen. 217 (1955). Since it is difficult to ascertain the true motivations behind any given payment, we generally discourage the acceptance of moving expenses from former employers. However, if it can be demonstrated that moving expenses are contractually or routinely paid by the private employer to departing employees, that the purpose of these payments is other than to compensate federal employment, and that the entitlement and amount of payment do not favor federal employment, then we will approve the payments under § 209. In our judgment, the proposed payment by University X meets these standards.

The University's Professional Development Program apparently was intended to serve in lieu of a university sabbatical program. It is clear both from the provisions of the plan, and from the traditional function of sabbaticals, that the primary purpose of such programs is to enhance the quality of service that the employee will render to the institution upon return from the leave. In this regard we note that University X's plan requires subsequent service, and provides for the evaluation of leave applications based upon their potential contribution to the goals and stature of the University. The materials you have provided also demonstrate to our satisfaction that University X's

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[1] We assume that the University's payment will not exceed your actual moving expenses and that it will be otherwise reasonable in amount.

plan compensates faculty for moving expenses with some regularity, and that it is not designed or administered to favor federal employment over other forms of professional development leave. Your letter explains that your school's policy has been to pay the moving expenses of faculty on professional development leave whenever those expenses are not paid from another source. In addition, you have advised us in telephone conversations that the vast majority of the University faculty who have taken professional development leave have done so to undertake projects other than federal employment. In light of these representations and our understanding of the purpose of the plan, we conclude that the University's payment of your moving expenses would not be compensation for your federal employment in contravention of § 209.

In addition to the proscriptions of § 209, the Justice Department's Standards of Conduct require that employees avoid financial interests that create a conflict of interest with their governmental duties, 28 C.F.R. § 45.735-4. We are aware of [no] immediate or anticipated conflicts that would be created by your continued affiliation with University X or by its payment of your moving expenses. However, should any matter affecting the interests of University X come before you in your official capacity, you may be required to disqualify yourself from any official participation in the matter. § 45.735-5. If such a situation arises, we will be available to advise you about it.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Aug. 7, 1974

Mr. Robert E. Montgomery, Jr.
Acting General Counsel
Federal Energy Administration
Room 5101
New Post Office Building
12th & Pennsylvania Avenue, N.W.
Washington, D.C. 20461

Dear Mr. Montgomery:

I am responding to your letter of July 19 to the Attorney General regarding a legal issue attendant to the proposal that * * * be nominated as * * * of the Federal Energy Administration. It appears that * * * came to the Government on * * *, and is presently serving as * * *. Prior to his federal employment, he had been employed for 13 years in a variety of Executive positions by * * * and its predecessor * * *.

The legal issue arises out of a lump sum severance payment of $90,000 made to * * * by * * * when he resigned to come to the Government. The issue is whether the payment could properly be considered as subject to the prohibition of 18 U.S.C. 209(a). That subsection reads in pertinent part as follows:

> "(a) Whoever receives any salary, or any contribution to or supplementation of salary *as compensation for his services* as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States * * *; or Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—" [Emphasis supplied.]

is guilty of a misdemeanor. What must be considered is whether the severance payment to * * * by * * * could be regarded as a

salary supplement in consideration of his government employment, prohibited by 18 U.S.C. 209(a).

At the outset it must be noted that * * * and * * *, sensitive to questions relating to the * * * payment, requested and received from the then Federal Energy Office an advance assurance that the payment would not violate the conflict of interest laws. It was only after this assurance was received that the payment was made. Despite the reservations concerning the payment hereafter discussed, it is the position of the Department of Justice that an investigation concerning possible violation of 18 U.S.C. 209(a) is not warranted in the circumstances.

On the basis of the facts you have presented to us, * * * received his payment pursuant to a long-standing * * * policy embodied in a formal document entitled "Public Service Leave of Absence and Termination Policy" covering employees who leave that Company to undertake various public service positions, both governmental and private. Under that policy, an employee who terminates his employment to accept public service receives a lump sum payment "in consideration of his past service." The payment is no less than one-quarter of one month's pay multiplied by the number of years of service and no more than twenty-four month's pay.

At the time he left * * *, * * * had thirteen years of service and was receiving a salary of $57,500. In addition, he had certain stock option rights and was entitled to certain bonuses. The payment of $90,000 is clearly higher than the minimum payment authorized under the * * * policy, but lower than the maximum of twenty-four months' pay.

You have advised us that the payment was calculated in the manner customarily used for senior executives who terminate for public service, whether governmental or private, or even for medical reasons or because of a reduction in force. In * * *'s case the calculation began with one month's salary multiplied by his years of service ($62,300). To this was added the amount of bonus income that he would lose for the year 1973 ($11,000); an amount representing the value of his stock options lost ($10,900); and a resettlement payment ($5,000). The total sum

of $89,200 was then rounded off to $90,000. On the foregoing facts, it appears that the payment was not based directly on the difference between * * *'s salary and his governmental salary—which would be a clear violation of 18 U.S.C. 209(a)—but rather on a customary formulation of severance pay under the long-standing public service termination policy.

The question remains whether nevertheless the payment may be viewed as a supplement to government salary for federal services even though salary differential did not enter directly into the calculation of the payment. Our concern in this regard is prompted, in part, by a * * * in which an * * * official is described as having characterized the payment to * * * as "based in part on the difference between his income at the company and his new salary in the government." This clearly suggests a supplement as compensation for his government service, the very thing 18 U.S.C. 209(a) prohibits.

In a letter to the Federal Energy Administration dated July 26, 1974, * * * explains this statement as reflecting the general policy behind the Public Service termination policy rather than a specific consideration in * * * case.

> This statement must be read in context with the underlying purpose of the * * * policy on termination pay. The purpose of that policy is to reduce the potential barrier to leaving * * * by alleviating the economic hardship incurred by an employee when he terminates his employment in mid-career. When an individual will be going to other employment after termination, whether private or public, we test the appropriateness of the indicated termination payment by references to the individual's probable economic situation after termination. In other words, if there were no economic loss there would be no payment.

* * * goes on to explain that the fact that * * * would be receiving less pay in government was taken into account in deciding *whether* there would be a payment but not in *calculating* the payment.

The interpretation of 18 U.S.C. 209(a) in light of the facts relating to * * * is difficult. We do not have the obvious violation involved in an *ad hoc* payment to an individual, whether by

lump sum or over a period of time, directly designed to provide the difference between his private industry and government salaries. Rather we have a payment made under the customary formula implementing a long-standing policy. In Manning, *Federal Conflicts of Interest Law,* p. 168, it is suggested that this may be determinative in deciding whether the statute has been complied with. Similarly, it appears that the * * * policy would provide payment not only to one entering government service but also to one going to an academic institution or a charitable foundation. In Perkins, *Federal Conflict of Interest Law,* 76 Harv. L. Rev. 1113, 1139, it is asserted that such a policy is not in violation of the law. He notes, that the Department of Justice had taken a stricter view on a substantially similar predecessor statute, 18 U.S.C. 1914. *Ibid.* Prior opinions of the Attorney General dealing with that statute, however, suggest that mere cognizance of the lower government salary does not, per se, contaminate an otherwise proper payment. 39 Op. A.G. 501; 38 Op. A.G. 294.

On the other hand, 18 U.S.C. 209(a) does not, by its terms, distinguish between payments calculated specifically with respect to the difference between the private industry and government salary and payments made generally in consideration of the lower government salary. It appears to prohibit any supplementation of salary made because of government service. The * * * policy of making termination payments only when "economic hardship" will result from public service suggests a supplementation of salary which, in this case, relates to government service.

While we do not question * * *'s good faith in this matter, we do have reservations concerning technical compliance with 18 U.S.C. 209(a) in this instance. Since there are respectable arguments, based on existing authorities, that the payment is permissible, however, and there is positive evidence of sensitivity on * * *'s part concerning possible conflict of interest problems, we suggest that the entire matter be laid before the appropriate Senate Committee for its consideration.

This matter has alerted us to the difficulty in ascertaining the precise application of 18 U.S.C. 209(a) to particular fact situations. We are told that termination payment formulae similar to * * * formula are common in industry. In our view, however, although precise guidelines may be difficult to construct, there are certain features of termination plans which would seem to be suspect and to merit special examination, *e.g.*, explicit consideration of a gap between industry salary and prospective government salary, consideration of non-vested industry fringe benefits to be forfeited upon entry into government, consideration of hardship entailed in resettlement costs, any payment so large as not to be easily explicable as a reward solely for past service. We believe these factors warrant critical scrutiny despite the authorities previously adverted to in this letter which suggest a narrow view of 18 U.S.C. 209(a).

We feel that in instances like the * * * case there is a need to implement more effective review and clearance procedures, so that more explicit guidelines can be developed by experience. Difficulties of the sort posed by this case could be avoided or minimized if, in the future, the Office ~~of Legal Counsel~~ of the Department of Justice were consulted prior to the payment of such sums and the nomination or appointment of persons in * * *'s situation. It must be remembered that the Government has an obligation not only to avoid violations of the conflict of interest laws but also to prevent situations having the appearance of conflict of interest.

Sincerely,

Mary C. Lawton
Acting Assistant Attorney General
Office of Legal Counsel

Oct. 21, 1974

Robert E. Montgomery, Jr., Esq.
General Counsel
Federal Energy Administration
Washington, D.C. 20461

Dear Mr. Montgomery:

This responds to your letter of September 16 concerning a recommendation that the President nominate * * * to be * * * Federal Energy Administration (FEA). * * * now is * * *. The question is whether, under the provisions of * * *'s employment contract with * * *, its general policy and its own interpretation of that policy, a termination allowance which * * * proposes to provide * * * on his resignation to join FEA, would be contrary to 18 U.S.C. 209.

For reasons to be discussed, we conclude that payment and receipt of the allowance would not violate section 209(a), and is permitted by section 209(b).

Subsection (a) of section 209 prohibits an officer or employee of the executive branch from receiving from any source other than the Government "any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee." Subsection (b) of section 209 establishes certain exceptions by permitting an officer or employee to continue to participate in a "bona fide pension, retirement, group life, health or accident insurance, profit sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer."

The statute reflects a balance struck by the Congress in order to facilitate the employment by the Government of qualified persons without relaxing basic ethical standards or permitting actual conflicts of interest. While supplemental compensation from an outside source is forbidden, the sacrifice of conventional fringe benefits from a previous employer is not required.

Your letter and the accompanying documents set forth in detail the facts and circumstances surrounding the proposed termination allowance of $225,606.70, which would be paid by * * * to * * * in 42 consecutive monthly payments, should he be appointed and leave the company on October 31, 1974. Before joining * * * as * * * in 1969, * * * served as President, and subsequently as Chairman of the Board, of * * *. By reason of this service (about 10 years and 7 months), he had accrued substantial retirement and disability benefits. In consideration of his willingness to accept employment with * * *, that company, in its February 25, 1969 employment contract with * * *, agreed that he would be eligible for benefits under its Employees Security Plan (the "Plan") as though his years of service with * * * had been spent with * * *. On September 24, 1974, * * * with knowledge of * * *'s intent to accept an appointment as * * * of FEA, entered into an agreement (the "Agreement") with him by which it terminated their employment relationship effective October 31, 1974, and thereby rendered him eligible for payments under the Plan.

In their express terms, the Contract and the Plan did not, strickly speaking, establish any entitlement to the allowance here at issue until the September 24 Agreement was executed. The Plan is applicable only to an employee "whose service is terminated by the Company" (Paragraph D) and the Contract likewise provides for payment under the Plan only "if the Employee's service be terminated by the Company for any reason other than for cause" (Paragraph 5). Thus, if the Company had refused to execute the September 24 Agreement, and if * * * himself had formally terminated the Contract, it would initially appear that the benefits would not have been available. The Chairman of the Board * * * however, has advised you that it is and has been the Company's understanding under the Contract that * * * would receive a termination allowance under the Plan (or a complementary Pension Plan) if he left the Company for any reason other than being dismissed for cause. You have furthermore advised us that when a voluntary departure has been proposed by a senior employee, it has been a prac-

tice of * * * to "terminate" the employee's contract pursuant to his request, and to pay the benefits allowable under the Plan; and that this has been done even in the case of departures to accept employment with other companies. If this practice were sufficiently consistent and well-known, or if the understanding of * * *'s employment Contract contained in the statement of the Company's Chairman of the Board could be established in court, it might be that * * *'s absolute entitlement to have entered the Plan could be demonstrated; in which case payments under the Plan (subject to other points discussed below) would, in our view, clearly qualify for this section 209(b) exemption.

Because this conclusion of prior entitlement depends on various elements of fact and of * * * law which we do not have before us, we are not prepared to render our opinion on this basis. Nevertheless, it is not the requirement of section 209(b) that initial application of the benefit plan to the employee be absolutely mandatory, but only that the plan be "bona fide." This means, in our opinion, that it must be a standardized plan generally applied—neither designed specially for the employee in question, nor applied exceptionally to him by reason of his Federal employment. This requirement is consistent with the retention of some discretion on the part of the previous employer—at both the stage of initial application of the plan and subsequently—so long as exercise of that discretion conforms to a practice which shows that it is not being used to induce or influence Government employment. We understand that to be the case with respect to the termination device in this instance. Given the Company's practice described above, it is presumably designed to enable the Company to decline to terminate an employee's contract (thereby forcing him to initiate the termination and render the Plan inapplicable) if he is resigning in disregard of the Company's urgent needs, or if he is leaving because of malfeasance but the Company does not wish to incur the risk of litigation by dismissing him on that ground. For these and similar purposes, the "Company termination" provision is a useful device; it may well be a common one. In the circumstances of the present case, we are of the view that it does not prevent the Plan from being "bona fide."

The Plan itself contains a further element of discretion on the Company's part. Even when it is applicable, the departing employee is eligible for payments only "if the Company shall so determine" (Paragraph D); and the Company reserves the right to modify or terminate payments at any time (Paragraph O). While at least the former discretionary provision seems clearly eliminated insofar as * * * is concerned by Paragraph 5 of the Contract, the latter may subsist. Moreover, if the former were generally applied to other employees, there would be some question whether the Plan was "bona fide" within the meaning of section 209(b). You have advised us, however, that both these elements of discretion on the part of the Company are intended to reflect the fact that the Plan is not a "fully funded or trusteed system"—that is, that the Company does not guarantee the existence of funds to commence or continue payments. Assuming that the discretion is regularly used only for this purpose, and perhaps in exceptional circumstances to deny payments to an employee who for some reason such as those described in the preceding paragraph may not be deserving, this would not, in our opinion, eliminate the Plan's character as a "bona fide . . . welfare or benefit plan."

Finally, we note the circumstance that the September 24 Agreement, in addition to effecting the Company termination essential for applicability of the Plan, raised * * *'s annual salary from $117,000 to $130,000, effective September 1, 1974. This has the effect of increasing the benefits payable under the Plan, and if it were done solely in contemplation of * * * anticipated Federal employment it would raise serious question under the conflict of interest law. As the Agreement reflects, however, this increase represents merely the restoration of * * * salary to its level in 1973, after which there was a 10% reduction. You have advised us that the reduction, attributable to temporary financial conditions, was generally applied to all of * * *'s senior officers, and that the restoration is similarly general. We note, moreover, that the increase merely enables * * * to receive termination benefits based on the highest annual salary he received during the term of his employment, which is of course normally

the terminal salary. Even if the restoration were initially applied only to * * *, if its purpose was merely to eliminate this unusual differential between his highest salary and his salary upon termination, it would in our view not vitiate the Plan.

On the basis of the facts set forth above, and those contained in your letter of September 24 and the attachments; and in particular assuming the existence of a Company practice of terminating senior employees who wish to resign in order to accept other employment; it is our opinion that the payments to be made to * * * under * * *'s Employees Security Plan will be payment under a "bona fide . . . employee welfare or benefit plan maintained by a former employer," and by virtue of 18 U.S.C. § 209(b) will not constitute any violation of Federal conflict of interest law.

We conclude that section 209 does not preclude payment of the proposed termination allowance to * * *. We note, however, that * * *'s entitlement to payment under the company Plan does constitute a "financial interest" in * * * which, under 18 U.S.C. 208(a), precludes his participation in a particular matter involving that company unless he obtains a waiver under 18 U.S.C. 208(b).

Sincerely,

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

May 10, 1976

James A. Wilderotter, Esq.
General Counsel
Energy Research and Development
Administration
Washington, D.C. 20545

Dear Mr. Wilderotter:

This responds to the request of your office of March 25, 1976, for our opinion as to the legality, under 18 U.S.C. § 209(a), of a payment of $84,000 which the * * * proposes to make to * * *, a present employee of * * *, should he terminate his employment with * * * and accept employment with your agency as * * *. It is our understanding that as * * *, * * *'s duties would consist primarily of overall responsibility for three projects under the jurisdiction of that division: the Clinch River Breeder Reactor Plant, the Fast Flux Test Facility and the Prototype Large Breeder Reactor. We further understand that * * * holds a major subcontract for the Clinch River Plant and a design contract for the Prototype Large Breeder Reactor.

The proposed payment to * * * would be made pursuant to a 1969-1970 * * * plan entitled "Service with the Federal Government by * * * Employees." This plan authorizes "severance allowances" to * * * employees who terminate their employment with * * * to accept positions in the federal service. The plan states that the allowances are to be made "solely on the basis of past service" to the company. Whether an allowance will be granted to a particular employee is a discretionary decision of the * * * Pension Board. No allowance may be granted, however, unless the position which the employee undertakes in the federal service is "a key position of a technical, advisory, ex-

ecutive, administrative or professional nature." The stated purpose of the plan is to encourage * * * employees, in appropriate cases, to undertake such federal service.

The question raised concerns the application of § 209(a), which reads as follows:

> "Whoever receives any salary, or contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, or
>
> "Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> "Shall be fined not more than $5,000 or imprisoned not more than one year, or both."

Section 209(a) in its present form was enacted as part of the 1962 revision of the federal conflicts of interest laws. Public Law 87-849, 87th Cong., 2d Sess. 1962, 18 U.S.C. §§ 201 et seq. In essence, the statute prohibits any payment to an individual from a private source *as compensation for* his service as an officer or employee of the executive branch of the government. The prohibition now embodied in § 209(a) first appeared in the Legislative, Executive and Judicial Appropriation Act of March 3, 1917, 39 Stat. 1106.[1] The object underlying this earlier pro-

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[1] This predecessor of § 209(a) provided: "That on and after July first, nineteen hundred and nineteen, no Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the

hibition was stated by the Attorney General to be "that no government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States."[2] The immediate predecessor of § 209(a) was 18 U.S.C. § 1914, virtually identical to the 1917 prohibition; it provided:

> "Whoever being a government official or employee receives any salary in connection with his services as such an official or employee from any source other than the government of the United States, except as may be con-

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services performed by him for the Government of the United States." The provision was codified as former section 66 of title 5, United States Code. Violation was a misdemeanor. Unlike § 209(a), it applied to all government officers and employees in whatever branch. The exception for payments made by local governmental units was thought necessary to preserve programs such as the agricultural extension programs. *See*, Manning, *Federal Conflict of Interest Law* at 172 (1984).

[2] 33 Op. A.G. 273, 275 (1922). A more elaborate statement of this principle is found in Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* (1960) at 211-212:

> "The rule is really a special case of the general injunction against serving two masters. Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers. The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government. In part the fear is that the government employee will not keep his nose to the grindstone; in part the fear is close to the fear of bribery; in part the fear is that outside forces will subvert the operation of regular policy-making procedures in the government (the historical source of Section 1914); and in part the rule is grounded in considerations of personnel administration."

The Supreme Court has stated that this prohibition, among others, was "directed at the crime of bribery in its open or subtle form." *Muschany* v. *United States*, 324 U.S. 49, 68 (1945). See also H.R. Rep. No. 748, 87th Cong., 1st Sess. 6 (1961).

tributed out of the treasury of any State, county, or municipality . . . shall be fined not more than $1,000 or imprisoned not more than 6 months, or both."

Despite certain differences in language between the two provisions, the legislative history of § 209(a) reflects that its meaning was not intended to vary in substance from that of § 1914.[3] There has been almost no judicial construction and little published administrative interpretation of § 209(a). Such material with respect to its predecessor is also limited, but is of some help in understanding the scope of the present prohibition. We are unaware, however, of any official published interpretative material dealing with the present issue of severance payments.

For the purpose of evaluating under § 209(a) payments made by an employer to a departing employee, one difference between the current provision and § 1914 should be noted. While the latter prohibited payments "in connection" with an individual's government service, § 209(a) prohibits payments made "as compensation for" an individual's government service. The change appears simply to have been intended to remedy what was thought to be the imprecision of the former phrase.[4] Opinions of the Attorneys General under § 1914, however, had expressed views consistent with this more precise wording of the prohibition. One such opinion stated "that no violation of the statute arises from the mere coincidence of Government employment and receipt of compensation from a private employer. No violation is present unless a connection is shown to exist between the public employment and private compensation."[5] In making clear that the "connection" between the pay-

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[3] See Department of Justice Memorandum re the Conflict of Interest Provisions of Public Law 97-849, 18 U.S.C. § 201 note. See also S. Rep. No. 2213, 87th Cong., 2d Sess. 14 (1962); Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1138 (1963).

[4] See S. Rep. No. 2213, *supra*; H.R. Rep. No. 748, 87th Cong., 1st Sess. 24-25 (1961).

[5] 41 Op. A.G. 217, 220 (1955). This opinion involved the members of an advisory committee to the Secretary of Agriculture composed of industry

ment and public employment is that the former is made *as compensation for the latter,*[6] the revision was simply codifying the advice rendered by the Attorney General under the predecessor provision, that the statute prohibits payments "received from a private person or source if it is paid or received as compensation or part compensation for the services rendered to the Government. . . . It does not, however, prohibit payments for services rendered exclusively to private persons or organizations and which have no connection with the services rendered to the Government."[7]

Thus, a payment in fact made solely in consideration of past service to a private employer, even if made at a time when the recipient is a government officer or employee, is not prohibited by § 209(a); and a payment made wholly or partly as compensation for the government services is a violation. Obviously, the issue turns upon the intent of the parties.[8]

The statutory phrase "as compensation for" assuredly embraces the situation in which federal service is "consideration" for the payment in the classic contract sense—and, as later discussion will suggest, that may be sufficient to dispose of the immediate case. But the statute also goes well beyond that. There is little doubt, for example, that a payment for governmental action previously taken by a Federal official would

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representatives who neither received compensation or other emoluments from the Government, nor took an oath of office. The question was whether § 1914 barred them from receiving their usual salaries from their private employers. While the Attorney General did not specifically address the issue of whether the members were Government officials or employees, he held that even if they were regarded as such, the mere receipt of salary from a private organization while serving as a member of the committee "cannot be in itself a violation of the statute. . . ." Under § 209(c), it should be noted, "special government employees" or those serving without compensation are not subject to the prohibition of § 209(a).

[6] See Manning, *Federal Conflict of Interest Law* at 163 (1964).

[7] 40 Op. A.G. 187, 190 (1942). The quoted language is only dictum, since the question was whether a government official was prohibited by statute from engaging in a private business activity for compensation.

[8] See 41 Op. A.G. *supra*, at p. 221.

violate § 209, even though that action could not constitute "consideration," since it was not bargained for.[9]

Advisory opinions relating to § 209 matters, in which the intent of the parties is the crucial issue, must ordinarily be based upon the inference which can reasonably be drawn from the circumstances surrounding the payment.[10]

The usual severance payment, made without taking account of the anticipated future status or activity of the departing employee, obviously presents no difficulties. It is clear that the entire basis for the payment is the past service which the employee has rendered. Ordinarily, however, conditioning the payment upon a future status or activity which can be of benefit to the employer suggests that the payment is in part classic "consideration" for undertaking the status or activity. In addressing what is essentially this same issue in another context, Williston says the following:

> It is often difficult to decide whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which interpretation of the promise is more reasonable, is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration. I Williston, Contracts § 445 (3d ed. 1957).

Moreover, even where the granting of a severance payment is not explicitly conditioned upon a particular future status or activity, retention by the employer of a complete discretion to determine whether a departing employee will receive payments, and the exercise of that discretion at a time when the employer has knowledge of the prospective subsequent status or activity of the employee, again suggests the possibility of a sufficient connection between the status or activity and the payment to support the conclusion that the one is "compensation for" the other.

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[9] See I Williston, Contracts § 142 (3d ed. 1957).

[10] *Compare* 33 Op. A.G. 273 (1922) *with* 26 Comp. Dec. 43 (1919).

Applying the foregoing to the present case: A significant feature of the company plan pursuant to which the present payment would be made is that the severance allowance is available only if the departing employee enters "a civilian non-elective position with the Federal Government"—and, indeed, only such a position which is also "a key position of a technical, advisory, executive, administrative or professional nature." Even then, the allowance is not automatic, but merely discretionary, company officers making their recommendations, and the Pension Board making its determination, in light of the particular "key position" involved. All this suggests that the nature of the federal work to be performed is the inducement for the payment, the quid pro quo—in short, the consideration.

This appearance is strengthened by the nature of the governmental duties which the departing employee in this case would undertake. As noted above, they would involve overall responsibility for projects in which * * * is a contractor or subcontractor. Directly in point is the following statement of the Attorney General in an opinion under the former § 1914:

> "An important factor in determining the intent is whether the individual rendering the service to the government is in a position by virtue of his government service to assist his private employer."[11]

Of course, a matter such as this cannot be resolved conclusively on the basis of documents alone, but would require actual investigation of all surrounding facts and circumstances bearing upon intent. Such an undertaking is simply not feasible in the context of the ordinary advice-giving function of this office. Thus, we are not in a position to advise categorically that the payment in question, if made, will violate § 209(a); but we think it sufficiently probable to advise strongly against your office's giving the approval which the * * * plan contemplates.

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[11] 41 Op. A.G., *supra*, at 220 (1955). See also Davis, *The Federal Conflict of Interest Laws*, 54 Colum. L. Rev. 393, 904-05 (1954); McElwain and Vorenberg, *The Federal Conflict of Interest Statutes*, 65 Harv. L. Rev. 955, 967 (1952); Dembling and Forest, *Government Service and Private Compensation*, 20 Geo. Wash. L. Rev. 174, 191-92 (1951).

We may add for your future guidance that, because of the probabilities which ordinarily exist when conditional severance payments are made; and because of the inability of this office to conduct factual investigation of the actual intent in particular cases; we will not, as a general matter and in absence of special circumstances, give advisory approval to any severance payments which are conditioned specifically upon Federal employment or which involve discretion which permits the employer to take account of the future status or activity of the employee. This is not to imply that such payments are necessarily violative, but only that we would not be in a position to conclude that the external circumstances are substantially probative of their validity.

We might view differently an inquiry concerning severance payments which are conditioned upon a broader category of subsequent employment activity—that is, if the qualifying activities include, but are not limited to, federal service, and if the previous employer does not have any discretionary power which enables him to select the particular activities to be rewarded. We would, for example, be prepared to consider advisory approval of a payment to which a departing employee is unqualifiedly entitled when he undertakes "continuing professional employment in the field of energy research and development." In such a case, it can be argued that although federal service happens to be the means by which the particular employee qualifies, he might as easily have qualified in some other fashion, wherefore the compensation is not "for" the federal service in the specific sense which § 209(a) envisions. We leave that issue for determination in the appropriate factual context, which may include factors bearing on the question whether the employer stands to benefit proximately from the employee's government services.

In reaching our conclusion, we have considered your office's reference to a letter dated September 2, 1969, from this office to the corporate counsel of * * *, regarding the * * * plan. While the consultation which that letter reflects evidences the good faith of the company in establishing its plan in the present form, I find nothing in the letter to suggest the view that any employee

qualifying under the plan would automatically avoid the restrictions of § 209(a). Indeed, the provision in the draft which was the subject of the letter (and which appears in the final * * * plan) to the effect that the grant of an allowance "will be subject to review . . . by the employee with the appropriate Government legal officer" demonstrates that no such blanket approval was contemplated, and that each case would have to be examined upon its own facts. In any event, if there is any inconsistency between that earlier consultation and the present opinion, you should henceforth be guided by the latter in your review of proposed payments pursuant to this or similar plans.

Sincerely,

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Oct. 7, 1976

John Cho, Esq.
Assistant General Counsel for
Administration
Energy Research and Development
Administration
Washington, D.C. 20545

Dear Mr. Cho:

This is in response to your request for the views of the Office of Legal Counsel regarding the legality of a payment that was proposed to be made by the * * * to a person who was being considered for employment by the Energy Research and Development Administration ("ERDA") for a period of one to two years while on a leave of absence from * * *.

The individual, whom you did not identify by name, would have been employed as * * * in ERDA's Fossil Demonstration Plants Division. The proposed payment would have been made under the * * * Public Service Leave of Absence and Termination Policy ("Policy"), a copy of which you made available to us.

We understand that ERDA has now hired someone else for the position in question and that the issue of the validity of the particular severance payment is now moot. Nevertheless, you have indicated that you would still like to have our views on the * * * Policy in the event that a similar question should arise with respect to any future payment under the Policy. Because the legality of a severance payment under 18 U.S.C. § 209(a) turns on the intent of the parties in the particular case, we do not ordinarily express an opinion on a severance pay plan in the abstract. However, because your request related to a specific proposed payment, and because in our opinion the payment would have raised a serious question under 18 U.S.C. § 209(a), we are willing to express our views on the * * * Policy in this case.

Under Part I of the Policy, an * * * employee is eligible for a lump-sum payment if he will be assigned to a "key position of a

technical, advisory, executive, administrative or professional nature" in a "qualified organization," defined to include the following: a Federal, State or local government or instrumentality, any international organization supported by the United States, any accredited public or private college or university in the United States, and any public or non-sectarian private body engaged in health, welfare, educational or community relations programs or activities in the interest of the general public. Even if these requirements are satisfied, however, an employee will not receive a leave of absence or termination of employment under the Policy if "management determines it would be inconvenient to release the employee's services."

Part II of the Policy provides that management "will grant" an eligible employee a leave of absence if his assignment will be temporary and if his services will be desired by * * * at the end of the assignment. If an employee is eligible under the Policy but management does not grant him a public service leave of absence, management "may grant" him a public service termination under Part III. In either case, Part IV provides that "the Company will pay a lump-sum to the employee, prior to the absence or termination as the case may be, in consideration of his past services" to the Company. The purpose of the lump-sum payment, as set forth in a letter to you of March 23, 1976, from * * * is "to encourage an employee to accept a special assignment which the employee has been requested to perform by a governmental organization or by other organizations engaged in activities in the general public interest."

If the qualified organization is a United States Government agency or organization, the lump-sum payment is calculated on the basis of one-half of a month's pay per completed year of service with * * * in the case of a leave of absence and one month's pay per completed year in the case of a termination, but in no event more than a total of 24 months' pay. When the employee is to work for any other qualified organization, however, the method of calculation just mentioned is used only as a "general guideline, subject at management discretion to adjustments, based on prior review and recommendations of the Employee Relations Division or the Coordinator of Executive

Development as appropriate in each case."[1] Moreover, we understand that in practice the amount calculated under the formula just described is a maximum for employees who do not go to the Federal Government—i.e., that the only "adjustments" made by management in such cases are downward. In his letter to you of February 12, 1976, * * * states that the fixed scale with respect to positions in the Federal Government was designed to meet Federal conflict of interest standards and that the Company desired to retain discretion regarding the amount of payment in all other cases, where those standards do not apply.

The principal conflict of interest statute applicable in a case such as this is 18 U.S.C. § 209(a), which provides:

> (a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county or municipality; or
>
> Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Assistant Attorney General Scalia of this office discussed the scope of this section at some length in a letter dated May 10, 1976, to Mr. James A. Wilderotter, General Counsel of ERDA.

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[1] Similarly, under Part V of the Policy, employees going to the Federal Government "will be regularly granted" relocation expenses for which they are not reimbursed by the Government, such as transportation, shipment of household items, and home sale assistance. Such payments are within management discretion when the qualifying organization is not a Federal agency.

In that letter, he advised against ERDA's approving a lump-sum severance payment of $84,000 to be made under a * * * plan which authorized such payments to * * * employees who terminated their employment to accept "a key position of a technical, advisory, executive, administrative or professional nature" with the Federal Government. In his view, the fact that the plan was limited to key positions in the Federal Government suggested that the nature of the Government work to be performed was the inducement for payments, especially since management had discretion whether or not to make a payment in any given case in light of the particular key position involved. It therefore appeared that the severance payment could properly be regarded as "compensation for" the individual's services to the Federal Government within the contemplation of 18 U.S.C. § 209(a).

The * * * Policy is not by its terms limited to positions in the Federal Government, although employees accepting such positions are in a sense preferred because only they are guaranteed the maximum financial benefits under the Policy. Mr. Scalia indicated in the May 10 letter that he might consider advisory approval of a severance payment conditioned on a broader category of qualifying activities, including but not limited to Federal service. In such a case it could be argued that although Federal service happens to be the means by which the employee qualifies for the payment, he might as easily have qualified in some other fashion, so that the compensation is not "for" the Federal service in the specific sense that section 209(a) might be thought to envision. At the same time, however, he recognized that if a plan which on its face permits payments to be made for a broad range of qualifying activities but at the same time gives the employer broad latitude to determine whether a payment would be made in a given case, the employer would be in a position to reward specific activities, including Federal service. Therefore, it was his view that the exercise of discretion whether or not to make a given payment at a time when the employer has knowledge of the subsequent status or activities of the employee suggests the possibility of sufficient connection between the

status or activities and the payment to support the conclusion that the one is "compensation for" the other. Because of this possibility, and because of the difficulties in ascertaining the subjective intent of the parties with respect to any given payment made under a facially neutral plan, he advised that this Department would not as a rule give advisory approval to severance payments to be made under a plan permitting the employer to take into account the future status or activities of the employee. The * * * Policy has this type of discretion built in at several stages.

First, as mentioned above, an * * * employee whose proposed activity is determined by * * * to be in a key position with a qualified organization is nevertheless ineligible for payments if "management determines it would be inconvenient to release the employee's services." The Policy sets forth no standards for this determination, which presumably is made at a time when management is aware of the employee's proposed undertaking. We note too that Part III of the Policy provides that if an employee is eligible for payments but management does not grant him a public service leave of absence,[2] management "may grant" him a public service termination. This obviously permits discretion in another principal aspect of the plan. Finally, as noted above, management has considerable latitude in determining the amount of payment in all cases except those involving Federal positions.

Because of these provisions in the * * * Policy granting management latitude in administering the Policy and because of the preferential treatment for employees who take positions with the Federal Government, payments under the * * * Policy

[2] Part II of the Policy provides that management "will grant a public service leave of absence if the assignment is temporary, if the employee will avoid conflicts of interest, and if the company will desire his services after the leave of absence is over. It is not clear whether management can deny a public service leave of absence to an eligible employee only if one of these three conditions is not satisfied, or whether Part III implies a broader power to withhold approval.

would in our view raise such a serious question under 18 U.S.C. § 209(a) that this Department could not approve them.

Sincerely,

Leon Ulman
Acting Assistant Attorney General
Office of Legal Counsel

Dec. 17, 1976

Mr. Bruce H. Hasenkamp
Director
President's Commission on White House
Fellowships
Washington, D.C. 20415

Dear Mr. Hasenkamp:

This is in response to your request for our views regarding the propriety of a corporate employer's providing certain benefits to one of its employees who is serving as a White House Fellow. You state that "[a] series of 'yes' or 'no' answers, rather than a formal opinion, will . . . probably suit our needs". But in this area it is not useful to proceed in that way.

The relevant conflict of interest statute here is 18 U.S.C. § 209(a), which makes it unlawful for an officer or employee of the Executive Branch, of an independent agency of the United States, or of the District of Columbia to receive from a source other than the United States Government, salary, or any contribution to or supplementation of salary, "as compensation for" the payee's services to the United States. Violations are punishable by a fine of not more than $5,000 or imprisonment for not more than one year, or both.[1] However, 18 U.S.C. § 209(b) provides that subsection (a) does not prohibit a Federal officer or employee "from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer." The validity of the various types of payments mentioned in your letter must be considered in light of these two subsections of 18 U.S.C. § 209.

[1] The statute does permit such payments as are contributed out of the treasury of any State, county, or municipality.

Moving Expenses to and/or from Washington, D.C.

This office has taken the position in the past that reimbursement for actual moving expenses is not the type of payment to which the prohibition in 18 U.S.C. § 209(a) was intended to apply. We believe, however, that payment must be limited to reimbursement for actual expenses incurred as opposed to an established moving allowance which might permit the recipient to retain the amount by which the allowance exceeded his actual expenses.

2. **Contributions to the employee's retirement or pension fund account.**

Such contributions are expressly authorized by 18 U.S.C. § 209(b), but only if made pursuant to a "bona fide" plan maintained by the former employer. A pension or retirement plan would ordinarily be considered "bona fide" if it covers a relatively broad class of employees and if participants who work for the Federal Government are not accorded special treatment under it. Because subsection (b) refers to a Federal employee's "continuing to participate" in such a plan, the employee must have been a participant in the plan before he began his Government service. An *ad hoc* or *ad hominem* payment of pension and retirement benefits on behalf of a particular White House Fellow would not be covered by the exemption in subsection (b) and would be unlawful under subsection (a) if made as "compensation for" his service to the Federal Government. See answer to question 3, *infra*.

3. **Granting of stock options.**

The granting of a stock option to a person in Federal service or about to enter Federal service is prohibited by 18 U.S.C. § 209(a) if it is granted "as compensation for" his services to the Federal Government. Whether a given payment is made "as compensation for" Government service and therefore prohibited by section 209(a) depends on the intent of the parties to the particular transaction. For example, a stock option granted

solely in consideration of past services to the private employer without taking account of the anticipated future status or activity of the employee who has accepted a White House Fellowship would present no problem. However, conditioning the grant of the stock option upon the future status or activity of the employee as a White House Fellow suggests that the payment is, at least in part, consideration for his becoming a White House Fellow.

Because it is virtually impossible to ascribe a particular subjective intent to an entire category of payments, irrespective of the parties involved, this office's advisory opinions in section 209 matters must ordinarily be based upon the inferences which can reasonably be drawn from the circumstances surrounding the type of payment in question. In following this practice, we have stated that we will not as a rule give advisory approval to payments to present or prospective Federal employees if the payor has discretion to determine whether the payment should be made. In our opinion, the exercise of that discretion at a time when the payor is aware of the recipient's status as a Federal employee suggests the possibility of a sufficient connection between the status and the payment that the one may be "compensation for" the other. That is not to say, of course, that all discretionary payments necessarily violate 18 U.S.C. § 209(a)—as we have said, that depends on the intent of the parties; we simply are not in a position to state that every discretionary granting of a stock option or other payment would be lawful under 18 U.S.C. § 209(a).

A non-discretionary grant of a stock option pursuant to an established company plan while the recipient is a Federal employee would, however, appear to be lawful if the plan satisfies the test in 18 U.S.C. § 209(b) of being a "bona fide . . . employee welfare or benefit plan." It is true that section 209(b) does not expressly mention a stock option plan among those in which a Federal employee may continue to participate notwithstanding § 209(a). It does, however, mention profit-sharing and stock bonus plans, both of which are indistinguishable for present purposes from a plan by which a company grants stock

options as a fringe benefit designed to permit its employees to participate in the growth of the company. For this reason, it is our opinion that continuing participation in a bona fide stock option plan does fall within the boundaries of the exception in § 209(b) and would therefore be lawful.

4. Contributions to the employee's account under a corporate savings and/or thrift plan.

Like stock option plans, corporate savings and thrift plans are not expressly mentioned in 18 U.S.C. § 209(b). But again, assuming that such a plan is "bona fide" for present purposes—i.e., one that covers a relatively broad class of employees and does not give special treatment to Federal employees—and that it can reasonably be characterized as an "employee welfare or benefit plan maintained by a former employer," we see no reason why such contributions would not ordinarily be lawful by virtue of the exception in 18 U.S.C. § 209(b).

5. Health, life, disability, and other insurance premiums.

Continued participation in bona fide insurance plans is expressly authorized by 18 U.S.C. § 209(b). Payment of insurance premiums on an *ad hoc* basis, independently of any company-maintained plan, would not be authorized under that provision.

6. Salary differential between one's salary as a Fellow and a higher corporate salary.

Payment of the salary differential would clearly constitute a "supplementation of salary" prohibited by 18 U.S.C. § 209(a). *See* R. Perkins, *The New Federal Conflict-of-Interest Law,* 76 Harv. L. Rev. 1113, 1137-38 (1963).

7. Rent for the employee's house back home, in the event the employee is unable to lease it during his/her year in Washington.

We have not previously expressed a formal opinion regarding this type of rent-guarantee arrangement. To be sure, such an ar-

rangement can be of financial benefit to a White House Fellow, and it might therefore be thought to be prohibited by 18 U.S.C. § 209(a) if that provision is to be applied strictly. However, payment by the company of rent for the employee's house incident to his moving to Washington or another location for the period of his White House Fellowship is in reality little different than the payment of the actual expenses of moving to the new location—expenses which we have previously stated may be paid to a person entering Government service under a special program such as this. For this reason, we believe that the company's arranging for the rental of the employee's home is permissible under 18 U.S.C. § 209(a). However, just as with moving expenses, there should be no opportunity for the employee to profit from the company's renting of his house. Rental payments should be calculated on the basis of a reasonable assessment of the rental market in the community where the house is located.

8. Can the company count the Fellowship year toward the number of years required for the vesting of a pension plan, the accrual of increased annual vacation, or the like?

Counting the Fellowship year toward the number of years required for the vesting of a pension plan would appear to be but one aspect of the employee's "continuing to participate" in the pension plan, which is permitted under 18 U.S.C. § 209(b). Counting the Fellowship year toward the accrual of increased annual vacation presents a somewhat more difficult problem. We do not believe that it would ordinarily be appropriate for a company to grant the employee several weeks of paid vacation time (or pay in lieu of vacation) on the theory that this benefit was "earned" during the Fellowship year. The granting of either would appear to constitute a supplementation of salary under 18 U.S.C. § 209(a). But counting the Fellowship year as a year of service with the company which may result in increased vacation time in *future* years bears a far more attenuated relationship to the Federal service. Vacation time is primarily earned in the year in which the individual renders services to the company.

Reference to prior years is usually made only to determine the amount of vacation time for which the individual is eligible. Assuming that the vacation entitlement is calculated according to an established and reasonable company policy, it is our view that counting the Fellowship year as a year of service to the company for this purpose is sufficiently far removed in purpose and effect from the type of payments sought to be prohibited by 18 U.S.C. § 209(a) that it would not be regarded as "compensation for" the Federal service within the meaning of that section.[2] In this connection, it should be noted that 18 U.S.C. § 209(b) does not prohibit a Federal officer or employee from retaining his status as a partner or employee of a private organization. If a White House Fellow takes a leave of absence from his previous position, accrual of seniority for vacation and similar purposes may be viewed as an incident of his being a partner or employee in the private organization (albeit in an inactive status) rather than an incident of Federal service. The same rationale would appear to apply where the Fellow resigns his prior position with the understanding that he will resume employment with his prior employer after the Fellowship year, since the break in the relationship with the prior employer in such a case is incomplete for conflict of interest purposes. *Cf.* 18 U.S.C. § 208(a).

You raised some further questions in your memorandum in addition to those regarding the specific types of payments just discussed. First, you asked whether a Fellow may continue his or her own contributions to insurance, savings or thrift, and pension plans maintained by a former employer, whether or not the employer contribution is proper. We have some doubt that

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[2] It might even be argued that a company's vacation policy could be regarded as an "employee welfare or benefit plan maintained by a former employer" in which a Federal officer or employee is permitted to participate under 18 U.S.C. § 209(b), at least to the limited extent of continuing to accrue seniority under that policy for purposes of future vacation years. We need not rest on that ground, however, in view of the position taken in the text, although this argument does tend to support our conclusion that counting the Fellowship year for increased annual vacation is not the sort of conduct to which 18 U.S.C. § 209, taken as a whole, is directed.

18 U.S.C. § 209(a) would prohibit contributions made by the Fellow, but in any event the Fellow's contributions would appear to be permitted under 18 U.S.C. § 209(b) as one aspect of "continuing to participate" in the plan.

Second you asked whether a White House Fellow could exercise a previously granted stock option during his or her Fellowship year. In our view, if the stock option was previously granted with no view to the recipient's Federal service, 18 U.S.C. § 209 would not prohibit the Fellow from exercising the option during the Fellowship year. *See* R. Perkins, *The New Federal Conflict-of-Interest Law,* 76 Harv. L. Rev. 1113, 1141 & n. 93 (1963). The transfer of value ordinarily occurs when the option is granted, not when it is excercised, so the exercise of the option does not give rise to an occasion for the supplementation of the recipient's Federal salary. On the other hand, if the option was originally granted with a view to the Fellow's Federal service, the grant itself would raise a question under 18 U.S.C. § 209(a), regardless of when the option is exercised. *See* answer to question 3, *supra.*

Finally, you asked whether a White House Fellow may retain a position as an officer or director of his or her corporation, or a subsidiary thereof, either on active or inactive ("on leave") status. As we have indicated earlier in this letter, 18 U.S.C. § 209 in itself does not prohibit a Federal officer or employee from holding a position with an outside company or organization. However, the general counsel of the agency to which the Fellow is assigned should be consulted to determine whether the holding of a position in the particular company raises any problems under specific laws or regulations applicable to that agency.

We have one final point. Although 18 U.S.C. § 209 does not require a Fellow to withdraw from pension, insurance, and similar plans maintained by his former employer or to resign from his positions with the former employer, 18 U.S.C. § 208(a) does prohibit the Fellow from participating personally and substantially in any particular matter in which the company which maintains such a plan or with which the Fellow has any

arrangement concerning prospective employment has a financial interest.

I should also stress that the views expressed in this letter are in the nature of general advice and do not constitute a definitive opinion of this office with respect to the widely varying factual situations that may arise.

Sincerely,

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

Sept. 15, 1977

Dear * * *:

You have asked for the opinion of the Office of Legal Counsel regarding the legality of a payment in the amount of $7800 which your previous employer, * * *, is considering making to you. For the reasons that follow, we advise you to decline the payment.

The proposed payment is in the nature of a severance payment or termination allowance. It may be useful to explain the law applicable to such payments generally before analyzing the specific factors bearing on the legality of the proposed payment here.

The pertinent conflict of interest statute in this situation is 18 U.S.C. § 209(a), which prohibits the payment or receipt of "any salary, or any contribution to or supplementation of salary, as compensation for" the recipient's services to the Federal Government. The penalty for a violation is a fine of not more than $5,000 or imprisonment for not more than one year, or both.

A severance payment made solely in consideration of past service to a private employer, even if made when the recipient is a government officer or employee, is not prohibited by section 209(a). A payment made wholly or partly as compensation for

the government service is a violation. Obviously, the issue turns on the subjective intent of the parties. 41 Op. A.G. 217, 221 (1955). And because the intent of the parties is crucial, advisory opinions relating to section 209(a) must ordinarily be based upon the inferences which can reasonably be drawn from the circumstances surrounding the payment.

It is important to note that the prohibition in section 209(a) applies even where the payor has no business before the agency in which the recipient serves. R. Perkins, *The New Federal Conflict-of-Interest Law,* 76 Harv. L. Rev. 1113, 1137 (1963). Thus, a violation does not depend on the existence of a conflict of interest in the sense that there must be an identifiable corrupting potential inhering in the payment. It is sufficient that the parties intend the payment as a supplementation of Federal salary, whatever the underlying motivation may be.[1]

We have previously interpreted the phrase "as compensation for" in section 209(a) to embrace at least those situations in which Federal service is "consideration" for the payment in the classic contract sense—i.e., where the nature of the Federal work to be performed is the inducement for the payment, the quid pro quo. Applying this rationale, we on one occasion declined to give advisory approval to a severance payment made pursuant to plan under which a departing employee was eligible only if he entered a key Federal position.

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[1] In describing the rationale for the broad reach of what is now section 209(a), one study stated:

> The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government. In part the fear is that the government employee will not keep his nose to the grindstone; in part the fear is close to the fear of bribery; in part the fear is that outside forces will subvert the operation of regular policy-making procedures in the government (the historical source of Section 1914); and in part the rule is grounded in considerations of personnel administration.

Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 211-12 (1960).

Moreover, even where the granting of a severance payment is not expressly conditioned upon a particular future status or activity, a payment made under a plan which grants the employer complete discretion to determine whether a departing employee will receive a severance payment and allows for the exercise of that discretion at a time when the employer may take into account the future status or activity of the departing employee also suggests the possibility of a sufficient connection between the future status or activity and the payment to support the conclusion that the one is "compensation for" the other.

Because of this possibility, and because of the inability of the Office of Legal Counsel to conduct a thorough factual investigation of the parties' actual intent in particular cases, we will not ordinarily give advisory approval to severance payments which are specifically conditioned upon Federal employment or which involve discretion which permits the employer to take the future status or activity of the departing employee into account. This policy rests not on the conclusion that all such payments would necessarily violate the statute, but rather on the assessment that the external circumstances are not sufficiently probative of their validity.

The $7800 payment * * * proposes to make to you is not made pursuant to an established severance pay plan. * * * has a plan providing for termination allowances under some circumstances, but it does not provide for a payment in the case of a voluntary resignation. The proposed payment here was authorized by a special resolution of the Board of Directors.

The minutes of the Board meeting relating to the payment, a copy of which was forwarded to us by * * *, states that the President informed the Board that you were being considered for an appointment to the * * * and that while your resignation from the company for this purpose was worthy of praise, it would nevertheless be a significant loss to the company. Accordingly, he recommended that the Board award you a "suitable honorarium . . . as a recognition of [your] outstanding services to * * *." The Board then adopted the following resolution:

> "RESOLVED, That the Board notes with regret the anticipated resignation of * * * from the Company's employ-

ment, and, therefore, in recognition of the esteem of her associates and in appreciation for * * * years of faithful service and valued contributions to the business of * * *, there is hereby awarded the sum of $7,800 as an honorarium payable from operating funds to * * * upon * * * resignation for the purpose of accepting appointment to the service of the United States should such resignation be required during the year 1977."

There is no established severance pay plan here under which eligibility is expressly conditioned on the acceptance of a key position with the Federal Government, as was true in the earlier case considered by this office, discussed above. But the specific Board resolution here contains the same defect, in that the honorarium was to be payable only upon your resignation "for the purpose of accepting appointment to the service of the United States." This strongly suggests that your Federal service was the inducement or consideration for the payment. Even if this language is not read as expressly conditioning the payment on Federal service, it is clear that the proposed payment is wholly discretionary and that the Board exercised its discretion with your acceptance of your present position principally if not exclusively in mind. As mentioned above, a discretionary payment of this type alone suggests the possibility of a sufficient connection between your Federal service and the payment that the one is intended as "compensation for" the other.

We have previously suggested that we would consider giving advisory approval to a severance payment made under a plan that conditions eligibility on a broader range of subsequent activities which includes Federal service if the employer does not retain discretion to reward particular activities. But in the present case, * * * informed us that a search of * * * files did not reveal even an informal policy of making severance payments to persons who voluntarily leave the company for other reasons. Nor was * * * able to give any assurance that the company would do so if such a case arose in the future. *Compare* Perkins, *supra,* 76 Harv. L. Rev. at 1137. This reinforces the inference

that you would not have been offered a payment but for your position in the Federal Government.

There are a few factors present here which differ somewhat from those involved in earlier severance pay situations considered by this office, but we do not believe they present the kind of special circumstances which would permit us to give advisory approval to the payment despite the nexus between the payment and your present position.

In severance pay proposals recently considered by this office, it has been the case that the payor was regulated by, had business before, or might otherwise have been in a position to benefit from the services the recipient would render to the Federal Government. This factor has been thought to indicate a motive for the company to make the payment and therefore be probative of an intent to supplement the Federal salary as compensation for the services. 41 Op. A.G. 217, 220 (1955). Here, it does not appear that * * * is significantly affected by * * * matters, except to the degree that the regulatory philosophy of * * * might have some spill-over effect on the regulatory philosophy of other Federal agencies, including the * * *[2] However, the interest of the payor in agency matters is at most probative of prohibited intent; as we have already noted, the prohibition in 18 U.S.C. § 209(a) applies even where the payor has no dealings with the recipient's agency. Here, the connection between the payment and your Federal service is close even in the absence of this additional factor.

Similarly, in some previous situations we have considered, the recipient took a cut in salary in going to work for the Government. An inference could therefore be drawn that the severance payment was intended to supplement the lower Federal salary in order to enable the individual to maintain his previous standard of living. Again, however, the lower Federal salary is not an element of the offense, but only a factor that has been taken into account in the past. Its absence is by no means decisive.

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[2] We note in this regard that you have specialized in the area of regulatory theory and pricing. Personal evaluations made available to us by * * * indicate that your work in this area has been relevant to * * * concerns in the past

Also, in the present case, the amount of the payment was calculated to equal the amount of three years' worth of * * * contribution to a stock savings plan that you will be required to forego because you are voluntarily leaving the company and the amount of taxes estimated to be due because you are realizing those contributions at the present time. As * * * points out in his letter of August 5 to Mr. Ulman of this office, the three years' of * * * contributions you must otherwise forego were themselves a reflection of past salary, service and performance. However, you are not entitled under the company plan to receive an amount equal to the company's contributions over the last three years. As * * * recognizes in his August 5 letter, the amount of the payment could have been calculated on some other basis or on no basis at all, and the amount and formula of the payment were therefore essentially a matter of judgment.[3] The important point for purposes of 18 U.S.C. § 209(a) is that you have no entitlement to a severance payment.

Finally, we note that while the amount of the proposed payment here is considerably less than that involved in a number of other severance payment situations, the amount of the payment is irrelevant in considering the application of 18 U.S.C. § 209(a).

For the reasons given, we must advise you to decline the proposed payment.

Sincerely,

Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel

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[3] * * * informed us, for example, that some consideration was given to basing the payment on the amount you would have received had you left involuntarily and therefore been eligible for a termination payment under the company's General Executive Instruction 5.1-3. Apparently, this higher amount ($30,613) was rejected because it might raise a question of appearances under the present circumstances.

APPENDIX C

Opinions of the Office of Government Ethics

Opinion 81 x 16

Letter to a private attorney dated July 31, 1981

By letter dated July 13, 1981, you have asked the Office of Government Ethics whether a proposed severance payment to a partner of [a large company] would be violative of 18 U.S.C. § 209. President Reagan has announced his intention to nominate (this individual) [to a position requiring the advice and consent of the Senate. ("the nominee")].*

You have informed us that the proposed severance payment by [the Company] to [the nominee] would be made pursuant to the [Company's] written Severance Pay Plan which you previously sent to us on April 30, 1981. On May 8, 1981, we sent to you a letter conditionally approving that Severance Pay Plan for purposes of 18 U.S.C. § 209 subject to certain provisos. The essence of those provisos were that "[w]e must be satisfied as to each payment under the [company's] Plan that partners going into 'public service' are in fact being compensated for past service to [the Company] (not as consideration for future activity or benefit to that company) and that entry into 'public service' is not always synonymous with entry into the federal service." (The quote is from OGE's May 8, 1981 letter to you.)

We find that the representations in your July 13, 1981 letter to us satisfy the provisos mentioned above in regard to [the nominee]. Rather than repeat those representations, we incorporate them herein by reference thereto. In brief, you have stated that [the nominee], with over twenty years of service as a key partner with [the Company], would be entitled under the Plan to a severance payment equal to one year's income as a partner (currently estimated at $200,000 to $250,000). The sever-

* The Department of Justice and the Office of Government Ethics have previously ruled in October 1979 that the [person holding the position to which he was nominated] and other offices and employees of the [the Office headed by this person] are subject to 18 U.S.C. §§ 207, 208, and 209, even though [the Office] is an "independent establishment" in the legislative branch.

ance payment by [the Company] would be awarded to recognize his past distinguished service to the firm and is similar to prior awards to [one partner] (equivalent to 10 months of income as a partner) and to [another partner] (equivalent to one year's income as a partner). Significantly, the severance payments to [these two former partners] were awarded when one was leaving [the Company] to go to an academic position and the other to a private organization (neither a part of the federal service). While these payments to [these two former partners] were made prior to the adoption of this 1981 written Severance Plan, we understand them to be made in the same manner as in the proposed payment under the Plan to [the nominee]. Finally, you have informed us that according to your research [the nominee] is the only partner [of the Company] who has previously (in 1967) resigned to enter employment with the Federal Government since World War II.

We therefore determine that based on the representations in your letter of July 13, 1981, the conditions stated in our May 8, 1981 letter to you are satisfied and that [Company's] intent to make this severance payment is a good faith effort to compensate [the nominee's] past service to [the Company] and not as consideration for any prospective federal government service.

Sincerely,

J. Jackson Walter
Director

Opinion 85 x 11

Memo to an Agency Ethics Official dated August 23, 1985

You have asked us to advise you regarding the application of 18 U.S.C. § 209(a) to a severance arrangement involving a prospective nominee to a Senate confirmed position.

From available information, it appears that the prospective nominee will resign his position as Chairman of the Board of a closely held corporation in which he is a major shareholder. He will retain his membership on the board on an uncompensated basis during his term of Federal appointment. He intends to return to his position as chairman of the corporation after he leaves Government service. He will retain his present vested interests in the corporation's ongoing profit sharing plan, pension plan and Supplemental Employees' Retirement Plan. He expects to continue his participation, on a reimbursement basis, in the corporation's group health and group life insurance plans.

In addition to the benefits described above, [the company] is considering the adoption of a severance benefits plan to provide payment to certain officers of the corporation, as designated by the discretion of the board of directors, who are leaving the company to perform public service, which would include service to local, state and Federal government, educational institutions, and charitable foundations. The proposed plan would pay the departing officer for past services an amount determined by the board of directors of up to 150% of the annual salary being received by the executive at the time of termination of employment, with the percentage of salary for a particular executive determined by (1) various factors, including years of service to the company, degree of responsibility for company affairs, and overall contribution to the success of the company over the period of employment, and (2) the costs of professional services incurred by the executive in connection with obtaining such position.

In applying this severance benefits policy to [this individual], it is anticipated that the board will approve a payment of 150% of his present salary of [x] for a total of [y], based on his [35 +]

years of service to the corporation and the large part he has played in developing the company to its present healthy financial condition and highly recognized stature in the publishing field. This benefit would be paid one half on January 1, 1986 and one half on January 1, 1987.

Although the issue is not without some doubt, for the reasons discussed below, we are of the opinion that 18 U.S.C. § 209(a) would preclude implementation of the proposed severance arrangement in [this individual's] case.

18 U.S.C. § 209(a) has four elements. It prohibits: (1) an officer of the executive branch or an independent agency of the United States Government from (2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States.

In most cases, the first three elements are relatively straightforward, and the focus of the section is whether a payment is "compensation for services as an employee of the United States." Violations in matters involving severance payments depend to a large extent on the subjective intent of the parties. Consequently, our decision is based upon the inferences which can reasonably be drawn from all the circumstances surrounding the proposed arrangement.

In our review of the proposed arrangement we have taken into consideration such factors as the majority shareholder status of the proposed recipient, his intent to return to this former position as chairman of the board of the company upon termination of Federal service, his continued presence on the board as an uncompensated director, and finally, the lack of a pre-existing established corporate plan or policy involving severance payments.

In the past, we have given advisory approval to severance payments made under a prospective plan that conditioned eligibility on a broad range of activities, including Federal service. However, we have never granted approval to a prospective plan where the recipient indicated his intention of returning to the company upon termination of Federal service. In spite of the proposed language of the arrangement, the inference can be

drawn that availing oneself to the several available benefit plans of the company coupled with an intent to return creates, in effect, a leave of absence situation where the severance arrangement is used simply to supplement Federal salary. A true severance payment would occur at the end of [the individual's] service to the corporation. Since he will continue to serve in a limited capacity while he is in the Government and intends to return to full time status after Government service, that time has not yet occurred.

Additionally, the approval of such an arrangement could conceivably affect adversely the confidence of the public in the integrity of the Government's decisionmaking process by creating the appearance of official governmental acquiescence in an arrangement created specifically to circumvent the limitations placed on Federal salary. Violations of section 209(a) do not depend on the existence of a conflict of interest in the sense that there must be an identifiable corrupting potential inhering in the payment. It is sufficient that the parties intend the payment as a supplementation of Federal salary, whatever the underlying motivation may be. In describing the rationale for the broad reach of section 209(a), the Association of the Bar of the City of New York in their book, *Conflict of Interest and Federal Service* at page 211-12 (1960), stated:

> The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government. In part the fear is that the government employee will not keep his nose to the grindstone; in part the fear is close to the fear of bribery; in part the fear is that outside forces will subvert the operation of regular policy-making procedures in the government; and in part the rule is grounded in consideration of personnel administration.

For the reasons given, we must advise you to reject the proposed severance arrangement.

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